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ELEMENTS

OF

MERCANTILE LAW

Fifth Edition.

BY

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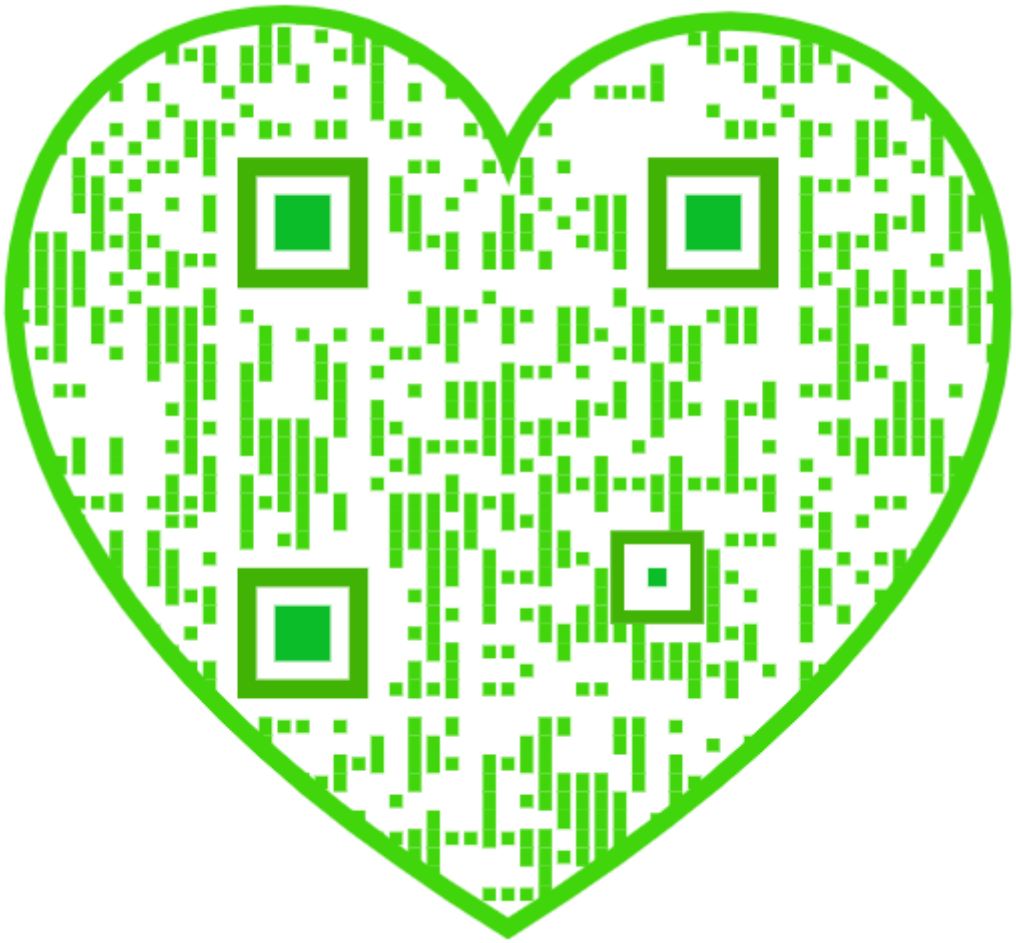

PREVIOUS EDITION .

First Edition by T. M. Stevens, M.A., B.C.L.
Second ,, ,, ,, ,,
Third ,, ,, Herbert Jacobs, B.A.
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PREFACE TO THE FIFTH EDITION.

During the eight years which have elapsed since the appearance of the Fourth Edition, which has been twice reprinted, the Law has undergone considerable changes owing to important statutory enactments and decisions of the Courts. The time has therefore arrived for the issue of this, the Fifth Edition.

In preparing this edition for the press I have endeavoured to give effect to various suggestions for the improvement of the work, while bearing in mind that it is recommended as a text-book for accountancy students and that their requirements should receive the first consideration. I have also taken the opportunity of thoroughly revising the text, with the result that almost every page has undergone some modification.

The chapter on "Marine Insurance" has been re-written in the light of the codifying Act of 1906. The dates of all cases cited are now given.

I am indebted to Mr. F. Porter Faussett, B.A., LL.B., of the Inner Temple, Barrister-at-Law, for the new chapters on "Companies" and "Arbitrations," and to Mr. B. W. Devas, M.A., of the Inner Temple, Barrister-at-Law, for the chapter on "Stock Exchange Transactions," and the Appendix on "Patents, Trade Marks, and Copyright." The inclusion of these additional subjects has increased the size of the book by ninety pages, the rest of the increase in size being due to a fuller treatment of the matter dealt with in former editions.

The Fourth Edition was translated into French by Professor L. Escarti, with an Introduction by Professor Paul Lerebours-Pigeonnière.

HERBERT JACOBS.

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THE

ELEMENTS OF MERCANTILE LAW.

PART I.

GENERAL VIEW OF THE LAW OF CONTRACTS.

A CONTRACT has been defined to be an agreement enforceable by law (*a*). From its nature it is clear that there must be at least two parties to a contract, for a man cannot contract with himself. Nor can a man agree to pay himself a sum of money *jointly* with others, therefore if A., B., and C. covenant jointly to pay money to A., D., and E., the covenant will be void (*b*). The parties must be of the same mind upon the subject: they must be *ad idem*.

Contracts are divisible into (1) *specialties;* (2) *simple* (*or parol*) *contracts.*

(1) Specialty contracts, also called *deeds*, are contracts under seal. It is necessary that they should be written, sealed, and delivered (*c*), and in practice they

(*a*) Pollock on Contracts, p. 2. For a full discussion of the meaning of the term "Contract," see Anson on Contracts, Part I., and the opening chapter of Pollock on Contracts.

(*b*) *Ellis* v. *Kerr*, [1910] 1 Ch. 529.

(*c*) Co. Litt. 171 b.

are always signed (*d*). The writing may be by hand or in print, and on paper or parchment. In modern times the seal has become a wafer or a mere piece of wax which has been previously attached to the document: the party "sealing" touches it with his finger, and so adopts it as his seal. Delivery may be actual—*i.e.*, handing over the instrument—or constructive—*i.e.*, speaking words importing an intention to deliver. As a rule, when the person executing touches the seal, he says, "I deliver this as my act and deed," and this is sufficient delivery, though he keep it in his own possession (*e*). If delivery is made, subject to a condition, to one who is not a party to the deed, the document is called an *escrow*, and then takes effect only when the condition is fulfilled. Whether it can be an escrow if delivered to a *party* is an open question (*f*); but, at least, if that party be one of several grantees, and also solicitor of the grantor and the other grantees, the deed may be an escrow if conditionally delivered to him in his character of solicitor (*g*). At one time a distinction existed between an indenture and a deed poll; the former has the edges indented, the latter is cut square. There is, however, now no difference whatever in their legal effect (*h*).

Specialty contracts differ from simple (or parol) contracts in the following respects: (i) No consider-

(*d*) As to whether this is necessary, see Bacon, Abr. Oblig. (C).

(*e*) *Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671.

(*f*) See Shepp. Touchs. 58, 59; *Hudson* v. *Revett* (1829), 5 Bing. 368, 387.

(*g*) *London Freehold, etc. Co.* v. *Suffield*, [1897] 2 Ch. 608, at pp. 621, 622.

(*h*) 8 & 9 Vict. c. 106, s. 5.

ation is required (*i*). (ii) A contract by deed merges in itself an agreement to the same effect contained in a simple contract. (iii) A statement in a simple contract is presumptive evidence of its truth against the maker of it; in a deed it is absolutely conclusive, unless fraud or duress can be proved, or the false statement is due to a mistake in respect of which equity would grant relief. This is styled *estoppel by deed*. (iv) A right of action arising out of a contract under seal is barred by non-exercise for twenty (or in some cases twelve) years; a right on a simple contract is barred in six (*k*).

(2) Simple contracts. This class contains every contract not under seal, whether written, verbal, or implied. "If they be merely written, and not specialties, they are parol" (*l*). Writing is often required, though in many cases there is a subsisting contract without it, the writing being but necessary evidence.

Another classification of contracts (which does not depend upon their form) is into *executory* and *executed*, the former being one in which a party binds himself to do or not to do a given thing (*e.g.*, exchange horses this day week), the latter one in which the object of the contract is at once performed (*e.g.*, exchange horses, which is done at once). A further division is into *express* and *implied*, the latter being (according to Blackstone) those "which reason and justice dictate, and which the law, therefore, presumes that every man

(*i*) See *post*, p. 16. But in the absence of consideration, equity will not give specific performance (*Groves* v. *Groves* (1829), 3 Y. & J. 163; *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138, 141.

(*k*) See *post*, pp. 81 *et seq.*

(*l*) *Rann* v. *Hughes* (1778), 7 T. R. 350.

undertakes to perform." Contracts of record may also be mentioned; they consist of such as are proved by production of the record of the court. The only important modern instances of contracts of record are judgments and recognizances.

Formation of a Contract.

A deed (as before stated) must be in writing and under seal. There must be consideration to support a simple contract, but otherwise, with certain exceptions hereinafter mentioned, no particular form is necessary; nothing but agreement, however shown or expressed, is required for the formation of a contract. The agreement may be drawn up in writing; it may be partly written and partly verbal; it may be entirely verbal, or it may arise from, and be proved by, the mere conduct of the parties. If a man hails a cab and directs the driver to take him to the Tower Bridge, he and the driver have entered into a contract; if he takes a bootlace from an itinerant vendor and hands the vendor a penny, they have entered into and performed a contract.

Sometimes, however, some special form is necessary; if so, this will be either writing under seal or writing without seal; and sometimes, though a verbal contract may be good, it may be unenforceable by action unless evidenced by writing.

Contracts which must be entered into by Deed.—Among these may be mentioned: (i) Contracts made by corporations; but there are many exceptions (*m*);

(*m*) See *post*, pp. 45—47.

(ii) gratuitous promises (*n*) ; (iii) leases for upwards of three years (*o*) ; conditional bills of sale (*p*).

Contracts which must be entered into in Writing.—These include : (i) bills of exchange and promissory notes ; this is required by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), and was formerly so by the common law (*q*) ; (ii) contracts of marine insurance (by 54 & 55 Vict. c. 39, s. 93). In addition there are certain transactions, closely connected with or involving contracts, to which writing is necessary ; for instance, an acknowledgment to take a debt out of the operation of the Statutes of Limitation, to be of any effect, must be in writing (*r*) ; transfers of shares in companies are usually required to be in writing.

Contracts which are Unenforceable by Action unless Evidenced by Writing.—By the *Statute of Frauds* (29 Car. 2, c. 3), s. 4, it is provided that no action shall be brought on any of the following, unless evidenced by some memorandum or note in writing, signed by the party to be charged, or by his agent authorised thereunto : (i) Promise by an executor or administrator to answer damages out of his own estate ; (ii) promise to answer for the debt, default, or miscarriage of another person ; (iii) an agreement in consideration of marriage ; (iv) a contract concerning lands, tenements, and hereditaments, or any interest therein ; (v) an agreement that is not to be performed within the space of one year from the making of it.

(*n*) See *post*, p. 17.
(*o*) Statute of Frauds, ss. 1, 2, and 8 & 9 Vict. c. 106, s. 3.
(*p*) See *post*, p. 467.
(*q*) Section 3 (1), (2).
(*r*) See *post*, p. 84.

By s. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), it is provided that "a contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf" (*s*).

Neither the provisions of the 4th section of the Statute of Frauds, nor those of the Sale of Goods Act, affect the existence of the contract; they merely render it unenforceable by action, unless it be evidenced by writing which fulfils the conditions of the statute. Accordingly, as the contract exists independently of the writing, the writing may be made at any time preceding the commencement of the action, but not afterwards (*t*), and any document signed by the party to be charged, or his agent, and containing the terms of the contract, is sufficient to satisfy the statute (*u*); *e.g.*, a will or an affidavit (*u*). Of course there must be consideration in every case, unless the contract be under seal, and it has further been held that a statement of this consideration must be included in the writing (*x*); but as regards guarantees, this is no longer law since the Mercantile Law Amendment Act, 1856, s. 3 (*y*).

The memorandum need not be on one piece of paper; it may extend over several, provided that these are so

(*s*) This section is dealt with *post*, pp. 245 *et seq.*
(*t*) *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357.
(*u*) *Re Hoyle*. [1893] 1 Ch. 84.
(*x*) *Wain* v. *Warlters* (1804), 5 East, 10.
(*y*) 19 & 20 Vict. c. 97.

connected and consistent that they can be read together (*z*). If the signed paper does not of itself show a connection with the unsigned paper, and is not in itself sufficient, the memorandum is not complete, and parol evidence will not usually be allowed to connect them; but identity of documents, persons, parcels and subject-matter referred to in the writing may usually be shown by oral evidence; *e.g.*, the term "our arrangement" was used in a letter, and this was allowed to be connected with an arrangement set out in a previous note, the whole being then taken as the true contract (*a*). And if two or more documents, which do not refer to each other, do refer to the same parol contract, they will constitute a sufficient compliance with the statute if they, taken together, contain the terms of the parol contract (*b*). A letter, which would be a sufficient compliance with the statute if it contained the name of the person to whom it is addressed, may be made complete by means of the envelope in which it was sent (*c*). And a letter written by an agent within the scope of his authority which refers to an unsigned document is a sufficient memorandum although the agent was not expressly authorised to sign the letter as a record of the contract (*d*).

The name of the party charged must be on the paper, but, in addition, the name of the other party, or a sufficient description (with which he may be connected

(*z*) *Boydell* v. *Drummond* (1809), 11 East, 142.

(*a*) *Cave* v. *Hastings* (1881), 7 Q. B. D. 125.

(*b*) *Studds* v. *Watson* (1885), 28 Ch. D. 305; *Oliver* v. *Hunting* (1890), 44 Ch. D. 205.

(*c*) *Pearce* v. *Gardner*, [1897] 1 Q. B. 688.

(*d*) *John Griffiths, etc. Corporation, Limited* v. *Humber & Co., Limited*, [1899] 2 Q. B. 414.

by evidence), must be included (*e*). Thus, a description of a party as "the proprietor" has been held sufficient where one proprietor only was in existence (*f*); on the other hand, "vendor" has been considered an insufficient description (*g*); so in like manner parol evidence is admissible to identify the subject-matter of a contract (*h*).

Only the signature of the party sought to be charged is requisite, though in most cases both parties would sign (*i*). The signature may be in ink or pencil, printed or stamped; an identifying mark or mere initials will suffice (*k*). It must be placed in such a position as to govern the whole document, and if such is the case, it need not be at the end—*e.g.*, if a man begin "I, A.B., agree, etc." and do not sign the paper at the foot, the statute is satisfied (*l*). In *Caton* v. *Caton* (*m*), Lord Westbury said the signature must be so placed as to show that it was intended to relate and refer to every part of the instrument. It may be that of the party to be charged, or of his duly authorised agent. Whether a person is agent for the purpose of binding his principal by his signature is in each case a question of fact which must be determined according to the circumstances, and with the assistance of the general principles of agency law. In every case, however, the

(*e*) *Champion* v. *Plummer* (1805), 1 B. & P. N. R. 252; *Williams* v. *Lake* (1860), 2 E. & E. 349; 29 L. J. Q. B. 1.

(*f*) *Sale* v. *Lambert* (1874), 18 Eq. 1.

(*g*) *Potter* v. *Duffield* (1874), 18 Eq. 4.

(*h*) *Plant* v. *Bourne*, [1897] 2 Ch. 281.

(*i*) *Reuss* v. *Picksley* (1866), L. R. 1 Ex. 342.

(*k*) *Baker* v. *Dening* (1838), 8 A. & E. 94.

(*l*) *Evans* v. *Hoare*, [1892] 1 Q. B. 593.

(*m*) (1867), L. R. 2 H. L. 127.

agent must have signed as a party and not as a mere witness. A person may be agent for both parties, but if he is himself one of the parties, he cannot be agent to sign for the other. An auctioneer is agent to sign for the vendor, and, in a public sale, for the buyer also after the lot has been knocked down to the buyer; his signature will then bind both parties. This authority to sign cannot be revoked after the fall of the hammer (*n*). This implied authority of the auctioneer does not extend to his clerk, but a party will be bound by the signature of the clerk if he assents to it by word or sign (*o*).

The absence of writing evidencing a contract of the kind affected by s. 4 of the Statute of Frauds, will not be fatal to the action brought upon it if the contract is of the class which, under the proper circumstances, would be the subject of a decree for specific performance, and has been partly performed (*p*), provided that such part performance is clearly attributable to the existence of the contract (*q*).

The above remarks as to the sufficiency of the writing apply to the 4th section both of the Statute of Frauds and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). As regards those contracts coming within the latter, see *post*, pp. 245 *et seq.* The following should be noted

(*n*) *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; reversed on another point, [1903] 1 Ch. 434.

(*o*) *Bell* v. *Balls*, [1897] 1 Ch. 663. In *Sims* v. *Landray*, [1894] 2 Ch. 318, ROMER, J., held a buyer bound by the signature of the auctioneer's clerk, but the circumstances proved in that case showed that the clerk had express authority.

(*p*) KAY, J., in *McManus* v. *Cooke* (1887), 35 Ch. D., at p. 697.

(*q*) See *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, and *cf.* *Miller and Aldworth, Limited* v. *Sharp*, [1899] 1 Ch. 622.

as regards contracts within s. 4 of the Statute of Frauds:

(a) The promise to answer for the debt, etc., is dealt with *post*, p. 441.

(b) The agreement in consideration of marriage must not be confused with a promise to marry; the agreement referred to in the statute is such a one as an agreement for a marriage settlement.

(c) What constitutes an interest in lands, tenements, and hereditaments is a question of property rather than of contract law. A debenture of a company giving a floating charge over "all property of the company whatsoever," creates an interest in lands if part of the company's property consists of land or buildings (*r*). This section applies to contracts concerning lands, though they be not contracts of sale (*s*).

(d) Agreement not to be performed within a year will include any agreement which cannot be performed on either side within the year, or which the parties intend not to be performed within that time (*t*). If, however, the contract is to be performed within the year by one party the statute does not apply (*u*); but the mere fact that the contract is capable of being performed on one side within the year, when it was not the intention of the parties that this should happen, does not exclude the

(*r*) *Driver* v. *Broad*, [1893] 1 Q. B. 744.
(*s*) Kay, J., in *Morganus* v. *Cooke* (1887), 35 Ch. D., at p. 687.
(*t*) *Peter* v. *Compton* (1693), 1 Sm. L. C. (11th ed.) 316.
(*u*) *Cherry* v. *Heming* (1849), 4 Exch. 631.

operation of the statute (*x*). This provision applies to agreements for the sale of goods, and accordingly, if any such agreement is not to be performed within a year, it cannot be enforced in the absence of a sufficient memorandum, although there has been acceptance and actual receipt of part of the goods sufficient to satisfy the requirements of s. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) (*y*).

ESSENTIALS OF A CONTRACT.

There cannot be a contract unless there has been mutual assent to the terms. Whether they be express or implied, a proposal and an acceptance of the proposal are the elements into which every contract may be analysed (*z*). In addition to these, all contracts not under seal (and contracts in restraint of trade, though under seal) require consideration to support them.

(i) Proposal and Acceptance.

A. may offer B. a book for sale at a certain price, and B. may say, "I take it at your price," or A. may expose it for sale on a book-stall, and B. may, with A.'s assent, take it up and remove it, saying nothing about price. In either case there is a clear contract—a definite proposal and acceptance ; in the latter case

(*x*) *Reeve* v. *Jennings*, [1910] 2 K. B. 522.

(*y*) *Prested Miners Co.* v. *Garner*, [1910] 2 K. B. 776 ; affirmed, [1911] 1 K. B. 425 ; and see *post*, pp. 246, 248—251.

(*z*) But see Pollock on Contracts, pp. 5—7, where the universal applicability of this analysis is questioned.

to pay the fair price of the book in return for the ownership.

The proposal need not be made, in the first instance, to any particular individual, but may be made to the general public, provided that it can be accepted by a definite person whose legal relations it was intended to affect. In *Carlill* v. *Carbolic Smoke Ball Co.* (*a*), the facts were these: defendants issued an advertisement in which they offered to pay £100 to any person who should contract a certain disease after using a certain remedy in a specified manner and for a specified period; the plaintiff duly used the remedy, and contracted the disease, whereupon the Court of Appeal held her entitled to the £100. Here was a definite proposal to anybody who would perform the conditions, and it was accepted by one of the persons to whom it was made. Other examples of this kind are: advertising a reward for services to be rendered (*b*), advertising unconditionally in a time-table that a train will start at a given time (*c*).

Further, the proposal must be accepted absolutely, and on the same terms as offered. If there is an offer to go to London for £50, which is accepted subject to a call being made at Guildford on the way, here is no contract; but if the first party assent to this, here is an agreement not dependent upon the original offer, but on the acceptance of the counter-proposal (*d*).

(*a*) [1893] 1 Q. B. 256.

(*b*) *Williams* v. *Carwardine* (1833), 4 B. & Ad. 621; *Warlow* v. *Harrison* (1858), 1 E. & E. 295.

(*c*) *Denton* v. *Great Northern Rail. Co.* (1855), 5 E. & B. 860; *Le Blanche* v. *Great Northern Rail. Co.* (1866), 1 C. P. D. 286.

(*d*) *Hyde* v. *Wrench* (1840), 3 Beav. 334.

It is not always the party who makes the first overture who is the proposer. For instance, a tradesman advertises that he has a cheap lot of goods for sale; he is not the proposer making an offer for a contract of sale, he is but holding himself out as ready to consider offers made to him. So when a company issues its prospectus, and asks for applications for shares, it is very seldom that the company so words the prospectus as to make it a proposal to the public—it is usually but an advertisement that the company is ready to consider offers; the application for shares is then the proposal; the allotment is the acceptance. The question is almost entirely one of fact, and must depend for its solution on the circumstances of each case (*e*).

An agreement will be binding when the proposal has been definitely accepted, even though the parties contemplate that the contract shall be afterwards drawn up in a formal shape (*f*). If there is a simple acceptance of an offer, accompanied by a statement that the acceptor desires that the offer should be put into some more formal shape, the mere reference to such a desire will not make the agreement already arrived at unenforceable; but if the agreement is made subject to conditions specified, then until those conditions are accepted there is no contract (*g*). If the contract is said to be contained in correspondence, the whole of the letters must be looked at to see if the parties have got beyond mere negotiation and have concluded an agreement (*h*).

(*e*) See and contrast *Great Northern Rail. Co.* v. *Witham* (1874), L. R. 9 C. P. 16, and *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256.

(*f*) *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295.

(*g*) *Crossley* v. *Maycock* (1874), 18 Eq. 181.

(*h*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.

An unaccepted proposal will not affect the rights of the parties, nor will a mere mental acceptance, uncommunicated to the proposer (*i*) ; but the proposer may waive notification by specifying a particular act which he will agree to take as notice of acceptance—*e.g.*, if the person making the offer expressly or impliedly intimates in his offer that it will suffice to act on the offer, so acting will be a sufficient acceptance (*k*).

An acceptance may be tacit if of such nature that it can be communicated to the proposer ; an illustration of this is the case of a person who buys a ticket from a railway company containing words that the passenger agrees to take it subject to conditions on the back or in the time-table books of the company. If the jury is satisfied that the passenger had reasonable notice of the conditions, the acceptance of the ticket will be deemed to be a tacit acceptance of the conditions as part of the contract (*l*).

A proposal, if the mode of acceptance is specified, is not properly accepted, unless it is accepted in the prescribed manner—*e.g.*, if the offerer say you must reply by wire in twenty-four hours, he cannot be bound by any acceptance not conforming to this direction.

A proposal may be withdrawn at any time before acceptance ; thus, a bid at an auction is not binding till accepted by the fall of the hammer (*m*) ; but for such withdrawal to be effectual the revocation must be

(*i*) *Bregden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, at pp. 691, 692.

(*k*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B., at p. 270.

(*l*) *Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416 ; *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470 ; *Richardson* v. *Rowntree*, [1894] A. C. 217.

(*m*) *Payne* v. *Cave* (1789), 3 T. R. 148.

communicated to the other party (*n*). If, when the offer is made, the proposer says that he will keep the offer open for a certain time, he may nevertheless revoke his proposal before the expiration of the time, if he has received no consideration for the promise to keep his offer open (*o*), and if he communicates his revocation before the other party accepts (*p*). When the proposal is made by post, and whenever the circumstances are such that, according to the ordinary ways of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted, and neither acceptance nor proposal can be revoked after that time (*q*). A revocation cannot take place after the acceptance has been duly posted (*q*), although it may not have arrived (*r*), or may never arrive (*s*); and to be of any avail the revocation of a proposal must reach the acceptor before he posts or telegraphs his acceptance (*n*). The acceptor, by posting the letter, has put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound (*t*). In this connection the cases of *Adams* v. *Lindsell* (*u*) and *Byrne* v. *Van Tienhoven* (*x*) are in point. In the

(*n*) *Byrne* v. *Van Tienhoven* (1880), 5 C. P. D. 344; *Stevenson* v. *McLean* (1880), 5 Q. B. D. 346.

(*o*) *Routledge* v. *Grant* (1828), 4 Bing. 653; *Dickenson* v. *Dodds* (1876), 2 Ch. D. 463.

(*p*) *Byrne* v. *Van Tienhoven*, *supra*.

(*q*) *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.

(*r*) *Dunlop* v. *Higgins* (1866), 1 H. L. Cas. 381; *Harris' Case* (1872), L. R. 7 Ch. 587; *Byrne* v. *Van Tienhoven*, *supra*; *Stevenson* v. *McLean*, *supra*.

(*s*) *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216.

(*t*) Lord Blackburn in *Brogden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, 691.

(*u*) (1818), 1 B. & Ald. 681. (*x*) *Supra*.

former, A. wrote, on September 2nd, offering to sell wool at a price, and asking for an answer in course of post ; the letter being misdirected, reached only on the 7th ; the answer, an acceptance, was sent at once, and came on the 9th, but the wool had been sold on the 8th. It was held that the buyers could recover for non-delivery of the wool. In *Byrne* v. *Van Tienhoven*, defendants offered goods for sale to the plaintiffs on October 1st ; on the 11th the letter arrived, and was accepted by wire at once. On the 8th, the defendants had written withdrawing the offer, and this was received on the 20th. The withdrawal was held to be too late. Lindley, J., said : "It has been urged that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is, for all practical purposes, and in point of law, no revocation at all." This view the learned judge adopted.

The proposal may lapse otherwise than by revocation —*e.g.*, by lapse of a specified time, by lapse of a reasonable time (*y*), or by death of the proposer or acceptor before acceptance.

(ii) Consideration.

This has been defined as "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (*z*). It is divisible into *executed*, or *executory*, and *past* or *present*. Executed consideration exists in (*e.g.*) the following case : when

(*y*) *Ramsgate Hotel Co.* v. *Montefiore* (1866), L. R. 1 Ex. 109.
(*z*) *Currie* v. *Misa* (1875), L. R. 10 Ex., at p. 162.

A. agrees to sell a horse to B., and immediately takes the money and gives the horse; but B.'s consideration is executory if he is to pay the money at a future time. In either case there is a present consideration. A past consideration exists when a promise is made to pay for services already gratuitously rendered, in respect of which no legal liability was incurred by the party benefited. Such a promise, although it may be based upon a moral obligation, is not binding. Sir William Anson lays down the following general rules as to consideration:

1. It is necessary to the validity of every contract not under seal.
2. It need not be adequate to the promise, but must be of some value in the eye of the law.
3. It must be legal.
4. It must not be past (*b*).

1. That there must be some consideration to support even a written contract, unless the contract be under seal or of record, is a principle of our law, for *Ex nudo pacto non oritur actio*. This was clearly expressed in the case of *Rann* v. *Hughes* (*c*). It might seem at first glance that bills of exchange and similar instruments are exceptions, but such is not the case; by the custom of merchants, these import consideration—*i.e.*, consideration is presumed, but, as between immediate parties, this presumption may be rebutted. If the contract be one in restraint of trade, though under seal, consideration is required (*d*).

(*b*) Law of Contracts (12th ed.), p. 90.
(*c*) (1778). 7 T. R. 350.
(*d*) See *post*, p. 24.

2. Once consideration is proved, adequacy is not important: the contract may be in consideration of £10 or £100, or of 10*s*. The contract may be enforced, if the promise is "either for the benefit of the defendant, or to the trouble or prejudice of the plaintiff" (*e*). "The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced" (*f*). But the consideration must exist, and be real. A mere pretence of it will not suffice. Thus work done, however little, would suffice as consideration for a sum of money, however great; but gratitude would not support a promise, any more than would blood relationship.

Thus, the following are sufficient to support a contract: Payment of money, compromise of an action, giving up a claim which has been honestly made, though in fact the claim is one which could not have been enforced (*g*). Inconvenience sustained at the request of one party may be good consideration—*e.g.*, the constant sniffing at a smoke ball (*h*). A forbearance to sue on request will be good consideration, though there be no binding contract not to sue (*i*).

The following are examples of agreements which are bad not on the ground of inadequacy, but of non-existence of consideration: A promise founded on moral obligation alone (*k*); a promise to do what the promisee can legally demand already; but if a third party asks a

(*e*) Com. Dig. Action on the Case in Assumpsit, B. 1.

(*f*) Blackburn, J., in *Bolton* v. *Madden* (1874), L. R. 9 Q. B., at p. 57.

(*g*) *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266.

(*h*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256.

(*i*) *Crears* v. *Hunter* (1887), 19 Q. B. D. 341.

(*k*) *Eastwood* v. *Kenyon* (1840), 11 A. & E. 446.

contractor to carry out his contract, this may be good consideration as between the contractor and the third party. Thus, in *Shadwell* v. *Shadwell* (*l*), an uncle offered an annuity to his nephew if he would carry out a previously arranged engagement with A. B., and fulfilment of the latter was held enough to support the uncle's promise. Payment of a smaller amount cannot alone be consideration for discharge from an agreement to pay a larger amount (*m*). In *Foakes* v. *Beer* (*n*), a debtor agreed to pay a judgment debt by a part payment down, the remainder by instalments, the creditor meanwhile agreeing not to proceed with his legal remedies. The House of Lords held that the debtor gave no consideration, as he could have been made to do what he did independently of his later promise; though had a bill of exchange been given, this would have probably amounted to good consideration (*o*); and clearly if the smaller sum had been, by agreement, paid before the full payment became due. In view of this it may be difficult at first sight to find the consideration for a composition with creditors, but it exists in the mutual surrender by the creditors of their individual claims, and not in the payment of a smaller sum for a greater (*p*).

The rule in equity as to adequacy of consideration is the same as at law, but equity is always on the look out to defeat fraud, undue influence, etc., and in many

(*l*) (1850), 9 C. B. (N.S.) 159.

(*m*) *Cumber* v. *Wane* (1721), 1 Sm. L. C. (11th ed.) 338.

(*n*) (1884), 9 App. Cas. 605.

(*o*) *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Bidder* v. *Bridges* (1888), 37 Ch. D. 406.

(*p*) *Good* v. *Cheesman*, 2 B. & Ad. 328.

cases inadequacy of consideration is very material to a proper decision.

3. The legality of the consideration will be dealt with below under the general head of Contracts which the Law will not enforce.

4. The consideration must not be past. "A mere voluntary courtesy" is not sufficient to support a subsequent promise (*q*). Thus, the mere existence of an antecedent debt is not sufficient valuable consideration for a security given by the debtor (*r*). But if there is an express or implied agreement to give time for payment, or if the creditor in fact forbears to sue on the faith of the security, even for some indefinite time, such giving of time or forbearance will constitute sufficient consideration. Securities so given will therefore seldom be impeachable for want of consideration in cases where the fact of their execution has been communicated to the creditor, and he has not immediately sued the debtor (*s*).

The following appear to be exceptions to the general rule: (i) it is said that a past consideration will be enough, if it has been given at the request of the person making the subsequent promise—*e.g.*, if A. requests B. to do certain work for him, and some time afterwards says, "You shall have £10 for that," the consideration, though past, is good (*t*); (ii) where a party originally

(*q*) See notes to *Lampleigh* v. *Braithwaite* (1615), 1 Sm. L. C. (11th ed.) 141.

(*r*) The law is otherwise with respect to bills of exchange. See *post*, p. 315.

(*s*) *Wigan* v. *English and Scottish Assurance Association*, [1909] 1 Ch. 291.

(*t*) Possibly this is no exception to the general rule; a promise to pay may be implied, and the £10 may be evidence of what would be the proper sum (*Stewart* v. *Casey*, [1892] 1 Ch. 115).

received benefit from the consideration, but some law (*e.g.*, Statute of Limitations) prevents the giver of the consideration from enforcing his rights, a promise by the party who received the consideration to perform his contract will be considered good (*u*).

Contracts which the Law will not Enforce.

Many agreements are unenforceable ; some are merely *voidable* or subject to repudiation at the option of one of the parties. Such are contracts obtained by fraud, which may in certain cases be set aside by the party defrauded (*x*). Other contracts are absolutely void, *i.e.*, they are altogether destitute of any legal effect. The latter class includes *illegal* contracts or such as having all the proper characteristics of a contract, the court will not enforce, either because they offend against public policy, or because some statute forbids their enforcement. It is important to bear in mind that void contracts are not necessarily illegal, and that illegal contracts are not necessarily criminal. When the contract is *illegal* the court will of its own motion refuse to enforce it, even though the illegality has not been pleaded by the defendant (*y*).

The presumption is in favour of validity, and every contract is considered valid unless it falls within some of the classes mentioned below ; if there is any serious doubt, the court inclines rather towards supporting than towards upsetting an agreement. This is especially

(*u*) *Flight* v. *Reed* (1863), 1 H. & C. 703. Formerly under this rule an infant, on coming of age, might give a valid promise to pay his old debts. But now see the Infants' Relief Act, 1874, *post*, p. 31.

(*x*) See *post*, p. 96.

(*y*) *Scott* v. *Brown*, [1892] 2 Q. B. 724.

the case as regards contracts which are attacked as being contrary to public policy—*i.e.*, such as it is deemed impolitic to recognise. At one time the tendency was to avoid many agreements on this ground, but the modern tendency is the reverse. The limits of the doctrine of public policy have now been settled by the House of Lords in the case of *Janson* v. *Driefontein Consolidated Mines, Limited* (*z*). A judge is not at liberty to declare a contract to be contrary to public policy merely because in his view it is inexpedient. The class of prohibited contracts must be treated as defined and ascertained, and no court can invent a new head of public policy. "It is always an unsafe and treacherous ground of legal decision" (*a*). In *Printing and Numerical Co.* v. *Sampson* (*b*), Jessel, M.R., said. "You have this paramount policy to consider—that you are not lightly to interfere with the freedom of contract."

The common law rule is, *Ex turpi causâ non oritur actio*. A contract for an object in itself innocent may be void if an illegal or immoral purpose is intended. Thus in *Cannan* v. *Bryce* (*c*), plaintiff lent defendant money to pay for losses on illegal stock transactions, and Abbott, C.J., said, "It is impossible to say that the making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment?" So where a brougham was supplied to a prostitute, and the evidence showed that the payment to be made was not to depend upon amounts earned,

(*z*) [1902] A. C. 484.
(*a*) *Per* Lord Davey, *ibid.*, at p. 500.
(*b*) (1875), 19 Eq. 462. (*c*) (1819), 3 B. & Ald. 179.

yet that the lender knew of the immoral object with which the carriage was hired, the court declared the contract illegal (*d*). Amongst contracts recognised by the common law to be illegal are: agreements of an immoral nature [*e.g.*, a promise of marriage made by a person who is already married to the knowledge of the promisee cannot in general be enforced after the death of the spouse (*e*)], agreements to commit a crime or a civil wrong, contracts for the sale of public offices, trading with an enemy (*f*), contracts impeding justice [*e.g.*, taking money to stifle a prosecution (*g*),] and contracts in fraud of the Revenue. Marriage brokage contracts are illegal, whether the object is to bring about a marriage with a particular person, or to introduce a number of persons with a view to marriage with one of them (*h*). Certain contracts in restraint of trade and contracts involving maintenance or champerty are also unlawful.

Contracts in Restraint of Trade.— A contract in restraint of trade is one which restricts a person from freely exercising his trade or profession. Where the restraint is not general, it may be limited in one or more ways, as by prohibiting the exercise of a trade for a definite time, or within a certain radius, or with particular persons. Thus, a covenant not to exercise the trade of a baker within the parish of St. Andrew's, Holborn, for five years, is limited as to space and time.

(*d*) *Pearce* v. *Brooks* (1866), L. R. 1 Ex. 213.
(*e*) *Wilson* v. *Carnley*, [1908] 1 K. B. 729.
(*f*) *Potts* v. *Bell* (1800), 8 T. R. 548.
(*g*) *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200.
(*h*) *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123.

A contract in general restraint is one which prohibits the exercise of a trade throughout the kingdom, and such a contract was formerly regarded as *ipso facto* void. This distinction cannot now be considered as universally applicable, but the law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do (*i*). However, the changed conditions of modern commerce have involved corresponding changes in the views of judges as to what is, and what is not, contrary to the public interest, and accordingly in a very special case a restraint unlimited in area or unrestricted as to time will be upheld (*k*). The true test is whether, in view of all the facts, the restraint imposed is reasonable and necessary for the protection of the party intended to be benefited, and then, if not otherwise injurious to the public interest, it will be valid (*k*). All contracts in restraint of trade, even though under seal, require consideration to support them (*kk*). It is for the judge, and not the jury, to decide as to the reasonableness of the contract (*l*).

The terms of these agreements are divisible, and, if readily separable, those which may be carried out are not deprived of effect by those which are illegal (*m*).

A contract in restraint of trade is part of the goodwill of a business, and for this reason is treated as assignable in the absence of any special provision to the contrary; it accordingly passes with the goodwill so as to

(*i*) Best, C.J., in *Homer* v. *Ashford* (1826), 3 Bing. 326.

(*k*) *Nordenfelt* v. *Maxim Nordenfelt Co.*, [1894] A.C. 535; *Underwood & Son* v. *Barker*, [1899] 1 Ch. 300; *Haynes* v. *Doman*, [1899] 2 Ch. 13.

(*kk*) See *Mitchel* v. *Reynolds* (1711), 1 Sm. L. C. (11th ed.), at p. 421.

(*l*) *Dowden and Pook, Limited* v. *Pook*, [1904] 1 K. B. 45.

(*m*) *Price* v. *Green* (1847), 16 M. & W. 346; *Baines* v. *Geary* (1887), 35 Ch. D. 154; *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520.

enable the purchaser to enforce the contract in his own name (*n*). If a contract of service is repudiated on the part of the master by the wrongful dismissal of the servant, the latter is no longer bound by a clause restrictive of his right to trade (*o*).

Contracts involving Maintenance or Champerty.—Maintenance "is when one officiously intermeddles in a suit depending in any court, which no way belongs to him, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. Champerty is . . . . a bargain by some person, with a plaintiff or defendant, to divide the land or other matter sued for between them, if they prevail at law; whereupon that person, who is called the *champertee*, agrees to carry on the party's suit at his own expense" (*p*). Taking a transfer of an interest in litigation as security is not champerty. Moreover, maintenance is lawful where the persons maintaining have a legal (not a mere sentimental) interest in the subject-matter of the action (*q*). And a supply of funds fairly and openly, and with an intention partly charitable, is not necessarily against the policy of the law (*r*); nor is a contract of indemnity given by a

(*n*) *Jacoby* v. *Whitmore* (1883), 49 L. T. 335.

(*o*) *General Billposting Co.* v. *Atkinson*, [1908] 1 Ch. 537; [1909] A. C. 118. The compulsory winding-up of a company is equivalent to a wrongful dismissal (*Measures Bros., Limited* v. *Measures*, [1910] 2 Ch. 248).

(*p*) Chitty, Contracts (15th ed.), p. 663; and see Termes de la Ley, Co. Litt. 368 b; *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1.

(*q*) See *Anderson* v. *Radcliffe* (1858). 28 L. J. Q. B. 32; (1860), 29 L. J. Q. B. 128; *Ram Coomar Condoo* v. *Chunder Canto Mookerjee* (1877), 2 App. Cas. 186, 210; *Guy* v. *Churchill* (1889), 40 Ch. D. 481.

(*r*) *Harris* v. *Brisco* (1886), 17 Q. B. D. 504; *Alabaster* v. *Harness*, [1895] 1 Q. B. 339.

trader, acting in the legitimate defence of his commercial interests ; although under the contract it may become necessary to provide funds for the defence of actions (*s*).

He who wrongfully maintains another in litigation is liable to an action for damages at the suit of the person injured.

Statutory Provisions.

Contracts forbidden by statutes cannot be enforced, whether they are forbidden expressly or impliedly. A question frequently arises whether a given act is forbidden by a statute or not. One rule has been laid down thus : if Parliament affixes a penalty to the commission of a given act, it does not forbid that act if the penalty is inflicted merely for revenue purposes —*e.g.*, penalty for not taking out a licence to sell tobacco (*t*) ; but if the act is forbidden for the protection of the public, the contract is illegal (*u*).

The following are cases of contracts made void by statute :

(a) *Gaming and Wagering Contracts.* — By the statute 8 & 9 Vict. c. 109, s. 18, "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void ; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or

(*s*) *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.*, [1908] 1 K. B. 1006.

(*t*) *Johnson* v. *Hudson* (1809), 11 East, 180.

(*u*) For a further test, see *Cope* v. *Rowlands* (1836), 2 M. & W. 149, in which Parke, B., said that if the statute is intended to forbid the act, the question of revenue purpose or non-revenue purpose could not affect the matter. See also *Victorian Daylesford Syndicate* v. *Dott*, [1905] 2 Ch. 624 ; *Whiteman* v. *Sadler*, [1910] A. C., at pp. 525, 533 *et seq.*

valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Securities deposited with a stockbroker to *secure* payment of "differences" in favour of the broker are not within these words, and may be recovered from the stockbroker (*x*); but not money so deposited if it has been appropriated to losses, because that is equivalent to a voluntary payment with knowledge of the facts (*y*). Money deposited with a stakeholder to abide the event of a wager may be recovered if its return is demanded before it has been paid over to the winner (*z*).

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win" (*zz*). To mercantile men, the importance of the statute lies in the effect it may have on Stock Exchange transactions. The law is this, that if when shares are bought or sold, there is a bonâ fide intention to take or deliver them, and to pay the price, then the contract is good; but if the intention of both parties is that the purchase or sale shall be a mere device under cover of which the parties gamble in the rise and fall of prices, then the contract is of a wagering nature, and is bad, even though it may give the buyer or seller an option to

(*x*) *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166.
(*y*) *Strachan* v. *Universal Stock Exchange*, [1895] 2 Q. B. 697.
(*z*) *Hampden* v. *Walsh* (1876), 1 Q. B. D. 189.
(*zz*) *Thacker* v. *Hardy* (1879), 4 Q. B. D., at p. 695, *per* Cotton, L.J.; and see *Richards* v. *Starck*, [1911] 1 K. B. 296.

demand delivery or acceptance of the shares (*a*). A. sells stock to B.; A. has none of the particular kind, and never intends to get any, nor does B. intend to buy them. This is a wager; but if an honest intention to buy and sell exists, the fact that the parties afterwards change their minds, will not affect the question —the contract is good.

Such contracts are *void* but not *illegal* (*b*); no offence is committed in making a wager, but the courts will not enforce the contract. Thus it will be entirely at the option of the promisor whether or not he pay the debt; he may do so if he likes; if he does, the money cannot be recovered. It would follow from this, that if an agent be employed to make the bet, the principal cannot set up the statute as a defence to an action by the agent for money paid in respect of a loss; the agent could sue on the implied contract to indemnify him in regard to moneys properly expended for his principal, as there is no violation of the law in paying bets at the request of the principal (*c*); and until the Gaming Act, 1892 (*d*), such was the law; but now by that Act it is provided that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the [Gaming Act, 1845 (8 & 9 Vict. c. 109)], or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such

(*a*) *Universal Stock Exchange* v. *Strachan* [1896] A. C. 166; *In re Giere*, [1899] 1 Q. B. 794.

(*b*) See *Saxby* v. *Fulton*, [1909] 2 K. B., at p. 227: *per* Buckley, L.J.

(*c*) *Read* v. *Anderson* (1884), 13 Q. B. D. 779.

(*d*) 55 Vict. c. 9.

contract, or of any service in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." But this statute does not enable a person who has *received* money for bets made by him on behalf of another to retain it (*e*).

Negotiable securities given in payment of bets on games and horse races, or for the repayment of money knowingly lent for gaming, are deemed to have been given on an *illegal* consideration; consequently, as between immediate parties they are unenforceable, but holders in due course may sue upon them; in other cases the consideration is merely void (*f*). Although money lent for the purpose of gambling in a foreign country, where the game in question is not illegal, *e.g.*, to play roulette at Monte Carlo, may be recovered by action in England (*g*); if a negotiable instrument payable in England be given for the amount advanced, the security (and probably the debt also) will be bad (*h*).

(b) *Sales and Trading Contracts on Sundays.*—See 29 Car. 2, c. 7, which forbids trading in course of the contractor's ordinary calling, and contracts made on Sundays in the course of such trade are, with certain exceptions, unenforceable. A bill of exchange, promissory note or cheque dated on Sunday is good (*i*).

(*e*) *De Mattos* v. *Benjamin* (1894), 63 L. J. Q. B. 248.
(*f*) See 9 Anne, c. 14, as amended by 5 & 6 Will. 4, c. 41, and *post*.
(*g*) *Saxby* v. *Fulton*, [1909] 2 K. B. 208.
(*h*) *Moulis* v. *Owen*, [1907] 1 K. B. 746.
(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 13.

(c) *Leeman's Act* (30 & 31 Vict. c. 29), renders void the sale of shares in a joint stock banking company, unless the contract sets forth in writing the numbers of the shares as stated in the register of the company.

(d) *Contracts contravening the Money-lenders Act*, 1900.—See *post*, p. 71.

Effect of Illegality.—As a rule, illegality avoids the whole contract; but if there be an independent stipulation, the exercise of which would not affect the agreement as a whole, the illegality of this stipulation will not avoid the whole contract. "The general rule is, that where you cannot sever the illegal from the legal part, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (*k*).

Can money paid under an *illegal* contract be recovered? This will depend upon whether the contract has been executed or is still executory. In *Taylor* v. *Bowers* (*l*), Mellish, L.J., said: "If money is paid, or goods delivered, for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain the action." It has been decided that he cannot recover if the illegal contract has been carried out even partly (*m*). But the courts

(*k*) Mr. Justice Willes, in *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235, at p. 250; cited by Chitty, J., in *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520, 522.

(*l*) (1876), 1 Q. B. D. 291.

(*m*) *Kearley* v. *Thompson* (1890), 24 Q. B. D. 742.

take a special view of marriage brokage contracts and will order repayment of money, even when something has been done in part performance of the contract, or even when the marriage has taken place (*n*).

Capacity to Contract.

Every person is presumed to have capacity to contract, but there are certain persons whose status, age, or condition renders them wholly or partly incapable of binding themselves by a contract—*e.g.*, infants. Incapacity must be proved by the party claiming the benefit of it, and until proved the ordinary presumption remains. The incapacity may be such as to make the attempted contract null and void, or it may be such as to render it voidable; in the latter case the contract remains valid until the option to render it invalid is exercised by the person entitled to avoid it.

Contracts with Infants.

A person under twenty-one years of age is an infant, and as the law does not recognise fractions of a day, a person attains his majority at the first instant of the day preceding his twenty-first birthday. Some contracts cannot be validly made by an infant. By s. 1 of the Infants' Relief Act, 1874 (*o*), "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void:

(*n*) *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123.
(*o*) 37 & 38 Vict. c. 62.

Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." This section, it will be observed, applies only to contracts relating to the sale of goods, the loan of money, and accounts stated (*p*). If an infant enters into any of these contracts the contract is absolutely void for all purposes; even a mortgage of land belonging to an infant to secure advances which the infant has expended in building on the land will be set aside (*q*).

The Betting and Loans (Infants) Act, 1892 (*r*), makes absolutely void an agreement by a person after he comes of age to pay any money which in whole or in part represents, or is agreed to be paid in respect of, any loan which made to an infant is void; and any instrument, negotiable or not, given in pursuance of such agreement is also absolutely void against all persons whomsoever. Such agreements are, however, only avoided in respect of money payable under them on account of such previous loan and will be valid to the extent of any new advance.

At common law, an infant's contracts were voidable, not void (*s*); that is to say, unless the infant repudiated them, they were valid and enforceable against him; he could always enforce them himself. The general rule seems to have been that if the contract was to be sustained, the infant must expressly ratify it on reaching

(*p*) See *Duncan* v. *Dixon* (1890), 44 Ch. D. 211.

(*q*) *Nottingham, etc. Building Society* v. *Thurstan*, [1903] A. C. 6.

(*r*) 55 & 56 Vict. c. 4.

(*s*) This is the general opinion. See Pollock on Contracts, 7th ed., pp. 54 *et seq.*

full age. But there are certain classes of contract which are deemed to be adopted unless the infant expressly repudiates them, and that within a reasonable time (*t*) of reaching his majority ; what amounts to a reasonable time being in each case to be determined on the particular facts (*u*). This latter group of contracts consists of those which are incident to interests in permanent property, and includes contracts of tenancy, partnership, contracts to take shares, and marriage settlements. An infant who remains in partnership after attaining his majority will be held liable as a partner for debts accruing after he comes of age. "If he wished," says BEST, J., in a similar case, "to be understood as no longer continuing a partner, he ought to have notified it to the world" (*x*). An infant may hold shares in a company, and if when he becomes of age he does not repudiate them, he will be deemed to have ratified the contract to purchase, and will be liable to be placed on the list of contributories (*t*). If he make a lease and accept rent after coming of age (*y*), or if he continue to occupy under a lease (*a*), in either case he will be considered to have adopted the contract ; though, had he wished to do so, he could have avoided the lease (*b*).

The common law has, in this relation, been somewhat altered by s. 2 of the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), above referred to. This section

(*t*) *Re Blakely Ordnance Co.* (1869), L. R. 4 Ch. 31 ; and *Ebbett's Case* (1870), L. R. 5 Ch. 302.

(*u*) *Edwards* v. *Carter*, [1893] A. C. 360, a marriage settlement case.

(*x*) *Goode* v. *Harrison* (1821), 5 B. & Ald. 159, 160 ; and see *per* Lord HERSCHELL, in *Lovell* v. *Beauchamp*, [1894] A. C., at p. 611.

(*y*) *Baylis* v. *Dineley* (1815), 3 M. & S. 477, 481.

(*a*) 1 Rolle Abr. 731.

(*b*) *Per* GIBBS, C.J., in *Holmes* v. *Blogg* (1818), 8 Taunt. 508.

provides that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." The effect of this has been much considered, but even yet seems not clearly determined. It is not limited to those contracts mentioned in s. 1 of the Act (*c*); nor does it, on the other hand, affect such contracts as leases, partnerships, and agreements to take shares; to these the old law applies, and the infant who desires to get out of liability on them must repudiate within a reasonable time of attaining his majority. This section of the Act does not make ratification invalid; what it does is to render it impossible for the creditor to sue the ex-infant on the ratified contract; for purposes of an action against him, the ratification is of no avail; but the contract exists, it may be enforced in any way other than by action, if way there be; it may be enforced by the infant himself, save that he cannot get an order for specific performance (*d*). In the result, however, an infant's ratification is of little use to the creditor.

There are two contracts of a nature similar to each other, which are allowed to be good even against an infant: if taken as a whole, the agreement is not so much to the detriment of the infant as to render it unfair that he should be bound by it (*e*); such are contracts of apprenticeship and service. The court, if satisfied

(*c*) *Coxhead* v. *Mullis* (1868), 3 C. P. D. 439.

(*d*) *Flight* v. *Bolland* (1827), 4 Russ. 298.

(*e*) Smith, L.J., in *Flower* v. *London and North Western Rail. Co.*, [1894] 2 Q. B., at p. 68.

that the contract is reasonable and for the benefit of the infant, will enforce its provisions even against him (*f*); otherwise it will not (*g*). If an infant's contract of service contains unreasonable stipulations in restraint of trade and these are severable, the void stipulations may be rejected and the operative part of the contract, if otherwise unobjectionable, enforced (*h*).

An apprentice cannot be sued on his covenant in the deed to serve (*i*), but a covenant for the payment of a fair and reasonable premium may be enforced against him when he comes of age (*j*); and so may a reasonable restrictive covenant not to compete in business after the cessation of the apprenticeship (*jj*).

Necessaries.—An infant is bound on his contract for necessaries, if the price be reasonable (*k*), as though he were of full age. They include, says Coke (*l*), "his necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." Where goods are supplied to an infant they must be suitable to his condition in life and to his actual requirements at the time of the sale and delivery (*k*); and it is for the *plaintiff* to prove that the infant was not sufficiently supplied with similar goods at the times

(*f*) *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482; *Green* v. *Thompson*, [1899] 2 Q. B. 1.

(*g*) *De Francesco* v. *Barnum* (1890), 43 Ch. D. 165; 45 Ch. D. 430; *Corn* v. *Matthews*, [1893] 1 Q. B. 310.

(*h*) *Bromley* v. *Smith*, [1909] 2 K. B. 235.

(*i*) *Gylbert* v. *Fletcher* (1630), Cro. Car. 179.

(*j*) *Walter* v. *Everard*, [1891] 2 Q. B. 369.

(*jj*) *Gadd* v. *Thompson*, [1911] 1 K. B. 304.

(*k*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

(*l*) Co. Litt. 172 a.

in question (*m*). But he cannot be sued on a bill of exchange or promissory note, though it be given for necessaries (*n*). And though an infant can enter into a contract to pay for necessaries, he cannot be bound by a bond with a penalty, even though the consideration be necessaries supplied (*o*).

The question whether a given thing is or is not a necessary is determined as follows: Evidence is given —which may include proof that the infant was already duly supplied with the thing in question (*p*)—and upon this the judge determines whether the things supplied can reasonably be termed necessaries; if he thinks the question open, he leaves the decision to the jury; if he has no doubt, he himself decides accordingly (*Ryder* v. *Wombwell* (*q*). The circumstances of that case were as follows: The defendant had £500 a year, and an expectancy on coming of age, and lived with relations. He bought some jewelled solitaires, a jewelled silver smelling bottle, an antique goblet, and a pair of coral ear-rings. The jury found that the solitaires and goblet were necessaries, but that the other articles were not. It was eventually held by the court that the plaintiff should have been non-suited, and the following rules were laid down: (1) That the judge must determine whether the case is such as to cast on the vendor the onus of proving the articles to be necessaries within the exception, and whether there is sufficient evidence

(*m*) *Nash* v. *Inman*, [1908] 1 K. B. 1.

(*n*) *In re Soltykoff*, [1891] 1 Q. B. 413.

(*o*) *Walter v. Everard*, [1891] 2 Q. B. 369.

(*p*) *Barnes* v. *Toye* (1884), 13 Q. B. D. 410; *Johnstone* v. *Marks* (1887), 19 Q. B. D. 509; the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

(*q*) (1868), L. R. 3 Ex. 90; and on appeal (1869), 4 Ex. 32.

to satisfy that onus. (2) A thing is a necessary if it is requisite that an infant should have the article for the purpose of maintaining himself in his station.

The following have been held to be necessaries :

Livery for an officer's servant (*r*) ;

Horse, when doctor ordered riding exercise (*s*) ;

Goods supplied to an infant's wife for her support (*t*).

The following have been held *not* to be necessaries :

Goods supplied for the purpose of trading (*u*) ;

Cigars and tobacco (*x*) ;

Refreshment to an undergraduate for entertaining (*y*).

Recovery of Money paid by Infant.—Whether an infant can recover money paid under a contract entered into by him which he either avoids or which *per se* is void, depends upon circumstances. In *Valentini* v. *Canali* (*z*), the contract was partially within s. 1 of the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), and to that extent void. The infant had hired a house, and had bought the furniture in it ; he paid part of the price for the furniture, and had occupied the house and used the furniture for several months ; the court held that the infant was entitled to have the contract set aside ; but, having used the furniture, he could not recover the money already paid under the contract. In

(*r*) *Hands* v. *Slaney* (1800), 8 T. R. 578.

(*s*) *Hart* v. *Prater* (1837), 1 Jur. 623.

(*t*) *Turner* v. *Trisby* (1719), 1 Stra. 168.

(*u*) *Thornton* v. *Illingworth* (1824), 2 B. & C. 824.

(*x*) *Bryant* v. *Richardson* (1866), 14 L. T. (N.S.) 24. It will be observed that this is an ancient decision.

(*y*) *Wharton* v. *Mackenzie* (1870), 5 Q. B. 606.

(*z*) (1890), 24 Q. B. D. 166.

Corpe v. *Overton* (*a*), the infant paid the defendant money in view of an intended partnership, but the partnership was never entered upon, hence the court ordered the defendant to return the money. In *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (*b*), an infant shareholder was allowed to recover moneys paid on application for the shares and allotment, but no dividend had ever been paid, nor had the shareholder attended or voted at any meeting. Stirling, J., said that in determining whether the infant can recover money paid under a repudiated contract, the test is to see if the infant derived any real advantage from the contract ; if he did, the money cannot be recovered. This accords with the authorities —*e.g.*, *Holmes* v. *Blogg* (*c*), wherein it was proved that an infant had *occupied* premises under a lease which he afterwards repudiated. In consequence of such occupation the court refused to order the lessor to refund a premium already paid by the infant.

Bankruptcy of Infant.—It has never been settled whether an infant can be made a bankrupt ; if he can, the liability in respect of which the petition is filed must have been incurred for a necessary, or the debt must be due under a judgment for an unliquidated demand arising otherwise than on contract (*d*). The Court of Bankruptcy may inquire into the validity of an alleged debt, and consider the plea of infancy although judgment has been obtained (*e*).

(*a*) (1833), 10 Bing. 253.
(*b*) [1894] 3 Ch. 589. (*c*) (1818), 8 Taunt. 508.
(*d*) *Ex parte Jones* (1881), 18 Ch. D. 109 ; Williams' Bankruptcy, p. 3.
(*e*) *Ex parte Kibble* (1875), L. R. 10 Ch. 373.

Contracts with Married Women.

I. *Contracts before Marriage.*—At common law the wife was liable to be sued on contracts entered into before marriage, but so also, during the coverture, was the husband (*f*). The liability of the husband is now limited to the extent of any estate or property which he may acquire in right of his wife, and a creditor, seeking also to make the husband liable, may sue husband and wife jointly upon such contracts (*g*). The liability of the wife for her *ante-nuptial* debts is a personal one (*h*).

II. *Contracts during Marriage.*—At common law a married woman has no power or capacity to contract, so as to sue or be sued, either with or without her husband, on her contracts made during coverture. To this general rule there were important exceptions—*e.g.*, (i) A married woman could sue jointly with her husband on contracts of which, as it was said, she was the meritorious cause—*e.g.*, on an agreement in consideration of her personal skill, that she should cure a wound (*i*), on a promissory note given to a woman payable to her (*k*). (ii) By the custom of the city of London a married woman may trade as a *feme sole*, and then may sue or be sued in the city courts on matters

(*f*) See *per* Lindley, L.J., in *Beck* v. *Pierce* (1889), 23 Q. B. D., at p. 320.

(*g*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 14, 15.

(*h*) *Robinson* v. *Lynes*, [1894] 2 Q. B. 577.

(*i*) *Brashford* v. *Buckingham and Wife* (1687), Cro. Jac. 77.

(*k*) *Philliskirk* v. *Pluckwell* (1814), 2 M. & S. 393.

arising out of that trade (*l*). (iii) According to the principles carried out in the Court of Chancery, property which was settled to the separate use of a married woman was looked upon as hers independently of any control of her husband. She could contract freely with regard to such property, but the contract would bind only such estate as at the time of contracting she was entitled to free from any restraint on anticipation (*m*).

Legislation has effected great changes in the law relating to married women, and their status is now mainly governed by the Married Women's Property Act, 1882 (*n*), as amended by the Act of 1893 (*o*).

Modern Law Governing the Position of Married Women.

The Married Women's Property Act, 1882, affects those married after January 1st, 1883, and those married before that date as respects property acquired after 1882. Its main provisions, as supplemented by the Act of 1893, are:

(i) A married woman shall be capable of acquiring, holding, and disposing (*p*) of property as her separate property and of contracting (*q*), as if she were a *feme sole*, but to the extent of her separate property only and so as to bind her separate estate only (*q*).

(*l*) *Beard* v. *Webb* (1800), 2 B. & P. 93.

(*m*) *Pike* v. *Fitzgibbon* (1881), 17 Ch. D. 454. The term "restraint on anticipation" is explained *post*, p. 42.

(*n*) 45 & 46 Vict. c. 75.

(*o*) 56 & 57 Vict. c. 63.

(*p*) Section 1 (1). (*q*) Section 1 (2).

(ii) Contracts made after December 5th, 1893, and entered into by a married woman otherwise than as agent (*s*), are deemed to be with a view to her separate estate, both that which she has at the time and that which she may thereafter acquire, so that she may bind her separate property which she is possessed of or entitled to at the date of the contract, and also that which she may thereafter acquire. On such contracts she may have judgment against her, though at the date of the contract she possessed no separate property; further, the judgment may be enforced against property she may be possessed of after she has ceased to be a married woman (*t*).

(iii) Settlements made, whether before or after marriage, are not interfered with by the Act (*u*), and restraints on anticipation are not affected by it, provided that no restriction on anticipation in a settlement of a woman's own property made by herself shall have any validity against her ante-nuptial debts (*v*).

It must be noticed that there is no remedy enforceable against the married woman personally; the debt is payable out of her separate estate only, and only then so far as she has property free from restraint on

(*s*) See *post*, p. 142.

(*t*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1.

(*u*) Section 19.

(*v*) *Ibid.*; and see *Jay* v. *Robinson* (1890). 25 Q. B. D. 467.

anticipation (*x*). If in fact a married woman contracts as agent, her separate estate is not liable to answer the debt, although the other contracting party does not know that she is agent or even that she is a married woman (*y*).

A judgment against a married woman should properly be expressly limited to separate property, not subject to such restraint (*x*), except where the restraint has been imposed on her own property by her own settlement (*z*). The death of the husband does not convert these limited judgments into judgments upon which she can be personally called upon to pay (*a*). Accordingly, she cannot be committed upon a judgment summons for non-payment (*b*) ; nor, unless she is trading apart from her husband, can she be made bankrupt (*c*) ; nor can she commit an act of bankruptcy by non-compliance with a bankruptcy notice (*d*).

Restraint on Anticipation.—Property is constantly transferred to trustees upon trust to pay a married woman the income thereof, with a proviso that she shall not have power to "anticipate" it, and the effect of this proviso is that until the income becomes due, she has no power of disposing of it, and cannot make it subject

(*x*) *Scott* v. *Morley* (1888), 20 Q. B. D. 120 ; *Softlaw* v. *Welch*, [1899] 2 Q. B. 419.

(*y*) *Paquin, Limited* v. *Beauclerk*, [1906] A. C. 148.

(*z*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19.

(*a*) *Re Hewett*, [1895] 1 Q. B. 328 ; *Softlaw* v. *Welch*, *supra*.

(*b*) *Draycott* v. *Harrison* (1886), 17 Q. B. D. 147.

(*c*) *Ex parte Jones* (1879), 12 Ch. D. 484 ; *Ex parte Coulson* (1888), 20 Q. B. D. 249 ; Married Women's Property Act, 1882, s. 1 (5).

(*d*) *Re Lynes*, [1893] 2 Q. B. 113 ; *Ex parte Handford*, [1899] 1 Q. B. 566.

to her debts ; hence a judgment creditor cannot attach or otherwise take such property in execution. If, however, judgment is obtained against her at a time when the income is due, though not yet paid over to her, the judgment creditor is entitled to take it in execution ; if the judgment has been obtained, and afterwards the income becomes due, he cannot attach it in the hands of the trustees (*e*).

Contracts with Lunatics and Drunken Persons.

A contract (except for necessaries) made with a person who is insane and does not know what he is doing, will, unless advantage has been taken of the lunatic's state, or unless the other contracting party was, at the date of the contract, aware of the lunacy, hold good (*f*) ; in other cases it is voidable. It may in any case be ratified when the lunatic recovers his senses. But a person found lunatic by inquisition, so long as the inquisition remains in force, cannot, even during a lucid interval, validly deal with or dispose of his property (*g*).

A person who enters into a contract when in a state of complete drunkenness, so that he does not know what he is doing, may avoid such contract (*h*) ; but it remains good unless he does so (*i*). If the contract is for the supply of necessaries at a fair price, in the absence of unfair dealing, it is good (*k*).

(*e*) See *Hood Barrs* v. *Heriot*, [1896] A. C. 174 ; *Bolitho & Co., Limited* v. *Gidley*, [1905] A. C. 98.

(*f*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599.

(*g*) *In re Walker*, [1905] 1 Ch. 160.

(*h*) *Gore* v. *Gibson* (1845), 13 M. & W. 623.

(*i*) *Matthews* v. *Baxter* (1873), L. R. 8 Ex. 132.

(*k*) *Gore* v. *Gibson* (1845), 13 M. & W., at p. 627.

Contracts with Corporations and Companies.

A *Corporation* is an artificial person created by special authority, and endowed with special capacity. It may consist of one person or of many, and in the former case is then known as a corporation sole (*l*). Coke says, "A corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law; it has no soul, neither is it subject to the imbecilities of the body." The individuals composing the corporation are not liable for its debts, nor entitled to its property, and here will be found the main difference between it and an ordinary partnership. The rules of Roman law on this point are applicable to English law, *Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent*, but on the other hand, *Si quid societati debetur singulis debetur, et quod debet societas singuli debent.*

Companies (*m*), in some cases, are nothing but ordinary partnerships with peculiar privileges—*e.g.*, the right to sue and be sued in the name of a public officer; sometimes they are special creations entirely distinct from the individuals composing them (*n*).

Contractual Capacity. — Corporations have but a limited capacity to contract, depending in each case upon the mode of its creation and the purposes for which it was constituted. But although the powers of

(*l*) *E.g.*, the vicar of a parish.

(*m*) Companies governed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), are dealt with *post*, pp. 196 *et seq.*

(*n*) See *In re George Newman & Co., Limited*, [1895] 1 Ch., at p. 685, and the opinion delivered in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22.

a corporation must be ascertained by reference to its constitution, these are sometimes implied. Thus, a trading corporation has, in the absence of express restriction, power to borrow money for the purposes of its business (*o*). Within the limits imposed it would seem that a corporation has the same power to contract, subject to the same restrictions as a natural person, and that it can act in any matter of business in the manner in which an individual conducting the same kind of business can act (*p*).

In the case of companies governed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), no contract is good which is not authorised by the powers given in the memorandum of association (*q*). A contract made in excess of the powers given to the corporation or company is said to be *ultra vires*, and is invalid. Moreover, a "public" company cannot commence business or borrow money until certain requirements have been complied with and the registrar of companies has certified that the company is entitled to commence business. Any contract made by the company before that date is provisional only, and not binding on the company, but it becomes binding on the granting of the certificate (*r*).

As a rule, a corporation must contract under seal, or, at least, through an agent appointed under seal (*s*). But in many cases, the use of the seal is not essential.

(*o*) *General Auction, etc. Co.* v. *Smith*, [1891] 3 Ch. 432.

(*p*) *Breay* v. *Royal British Nurses' Association*, [1897] 2 Ch. 272.

(*q*) See *Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87.

(*s*) *Church* v. *Imperial Gas Light Co.* (1837), 6 A. & E. 846.

In the case of non-trading corporations importance has always been attached to the formality of sealing; but two classes of contracts have long been recognised as not requiring to be under seal. Such contracts are (i) those which relate to matters of small importance; and (ii) those which relate to matters of frequent occurrence: in which cases the convenience of dispensing with the seal amounts almost to a necessity. In *Lawford* v. *Billericay Rural Council* (*t*), the previous decisions were reviewed, and a third important exception was established. When a contract with a corporation for work or services in respect of matters for the doing of which the corporation was created is *executed*, and the corporation has accepted the benefit of the work or services, it must pay upon a contract implied from the acts of the corporation, notwithstanding the absence of a contract under seal. With regard to trading societies, all contracts made by them within the scope of the business are binding, though not under seal, and the power to contract by parol does not depend upon the magnitude or insignificance of the subject-matter, but upon whether or not the contract be for a purpose connected with the objects of the corporation (*u*).

In some cases, when a contract has been partly performed, the absence of seal has been held to be no bar to an action; but it would seem that the part performance must be of such a nature as would entitle a party in equity to a degree of specific performance—

(*t*) [1903] 1 K. B. 772.

(*u*) *Church* v. *Imperial Gas Light Co.* (1837), 6 A. & E. 846; *Clarke* v. *Cuckfield Union* (1852), 21 L. J. Q. B. 349; *South of Ireland Colliery Co.* v. *Waddle* (1868), L. R. 3 C. P. 463.

i.e., it must be inequitable that the party who performs should not have what he bargained for from the other party, and it must be shown that damages would be inadequate to meet the case. As to this, see *Fishmongers' Company* v. *Robertson* (*x*); *Ecclesiastical Commissioners* v. *Merral* (*y*).

Agreements not under seal may be made by certain corporations in accordance with statutory powers.

Mode of Contracting by Registered Companies.—The Companies (Consolidation) Act, 1908 (*z*), as regards companies dealt with by the Act, enacts as follows: (i) any contract which, if made between private persons, would by law be required to be in writing and under seal, may be made, varied, or discharged under the common seal. (ii) If the contract, as between private persons, required to be in writing and signed by the parties to be charged therewith, it may be made, varied, or discharged in writing, and signed by any person acting under the express or implied authority of the company. (iii) If, as between private persons, the contract might be made by parol only, not reduced into writing, it may be made, varied, or discharged by parol by any person acting under the express or implied authority of the company (*a*). The making and acceptance of negotiable instruments by a company is referred to hereafter, at p. 303.

(*x*) (1843), 5 M. & G. 131.

(*y*) (1869), L. R. 4 Ex. 162.

(*z*) 8 Edw. 7, c. 69, s. 76.

(*a*) See 8 & 9 Vict. c. 16, s. 97, as regards contracts of companies within that statute.

Contracts with Bankrupts.

A person who is made bankrupt is not incapacitated from contracting, but if while undischarged he obtains credit to the extent of £20 or upwards without informing his intended creditor that he is an undischarged bankrupt, he will be liable to imprisonment (*b*). If a contract is entered into, and one of the parties is adjudicated bankrupt, the rights and liabilities under the contract pass to his trustee (*c*): but the trustee may by disclaimer abandon the contract (*d*). Contracts requiring the personal services of the bankrupt cannot be enforced by the trustee in bankruptcy against the other party unless the bankrupt is willing to render the services (*e*). The rights of the other party are: (i) to prove for loss sustained by non-fulfilment of the contract if the liability of the bankrupt be of a provable nature (*f*); (ii) in the case of a contract to deliver non-specific goods by instalments, to refuse to deliver instalments after the bankruptcy begins until he is paid for them (*g*): and (iii) he may apply to the court to have the contract put an end to, and the court may rescind it on terms that such party do pay damages to the trustee or prove for damages against the estate, or otherwise (*h*).

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31.

(*c*) *Ibid.*, s. 44; this is subject to the exception that if the contract be one affecting merely the person of the debtor, *e.g.*, to cure, it will not pass to the trustee.

(*d*) *Ibid.*, s. 55.

(*e*) Williams' Bankruptcy, 9th ed., p. 220.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37.

(*g*) Williams' Bankruptcy, 9th ed., p. 218.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (5).

Miscellaneous Cases.

A barrister cannot sue for his fees; nor can a Fellow of a College of Physicians, the Fellows of which are prohibited by byelaw from recovering at law their expenses, charges or fees (*i*).

An alien enemy is incapacitated during the continuance of a war.

Foreign sovereigns and states may contract, but the contract cannot be enforced against them unless they consent; the same applies to ambassadors (*k*).

Rights and Duties under the Contract.

The first point to consider is—Who may enjoy the rights, and who may be put under liabilities on the contract? The general rule is clear, that only those who have entered into the contract are able to enforce it or liable under it (*l*). Thus, if A. agree with B. that C. is to have £100, C. cannot compel payment, nor can B., by contract with A., bind C. to do anything. There was formerly some doubt as to the prevalence of this rule in equity (*m*), but this doubt has been removed by the decision in *Eley* v. *Positive Government Security Life Assurance Co.* (*n*). A later case is that of *Browne* v. *La Trinidad* (*o*); it appears that an agreement had been entered into between B. and the trustee

(*i*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6.

(*k*) 7 Anne, c. 12.

(*l*) *Price* v. *Easton* (1820), 4 B. & Ad. 433.

(*m*) *Touche* v. *Metropolitan Warehousing Co.* (1871), L. R. 6 Ch. 671.

(*n*) (1866), L. R. 1 Ex. 88.

(*o*) (1887), 37 Ch. D. 1.

of an intended company, by which B. was to be appointed an irremovable director ; when the company was formed, this agreement was said to have been incorporated in one of the articles of association, but it was held that even if that were so, the articles amounted to a contract only between the shareholders as a body, and that B. could not sue the company although he was himself a shareholder, as he had no agreement with it.

It might seem that the case of contracts made by an agent is an exception to the rule, but this is not so. An agent is practically the principal ; *qui facit per alium facit per se*, or rather we might say, *facit ipse*. This is dealt with later, pp. 141 *et seq.*

But though no contractual obligation can be cast upon a person by a contract to which he is a stranger, yet a duty may be thrown on him to respect it, and interference may subject him to liability (*p*). In *Lumley* v. *Gye* (*q*) a singer agreed to sing at a particular theatre, and the defendant, without legal justification or excuse, induced her to break the contract. The majority of the court held that an action would lie for procuring a breach of the contract. This principle is not limited to contracts of personal service (*r*). The decision in *Lumley* v. *Gye* underwent much criticism, especially in the celebrated case of *Allen* v. *Flood* (*s*) ; but it must now be taken to have been rightly decided (*t*). To excuse interference the justification must exist in fact, and must be founded

(*p*) As to "trade disputes," see *post*, p. 52.
(*q*) (1853), 2 E. & B. 216.
(*r*) *Temperton* v. *Russell*, [1893] 1 Q. B. 715.
(*s*) [1898] A. C. 1.
(*t*) *Quinn* v. *Leatham*, [1901] A. C. 495.

on a right equal or superior to that of the plaintiff. A mistaken belief in such a right, however honest, will not exonerate the defendant; good faith and the absence of ill-will are not lawful justification or excuse (*u*). If, however, A. should sell the same chattel to B. and then to C., B. would clearly be entitled to put all legitimate pressure on A. to deliver the chattel to him, though this would involve a breach of the contract with C. But the justification need not be founded on the personal rights of the defendant; it may arise from a duty which he owes to another. No satisfactory definition of what will constitute sufficient justification is possible, and each case must be decided on its facts. The court will, however, have regard to the nature of the contract broken; the position of the parties to it; the grounds for the breach; the means employed to procure it; the relation of the person who procures the breach to the person who breaks the contract; and the object in procuring the breach (*x*). It is no excuse for preventing a person from obtaining or holding employment that it is done to compel payment of a debt (*y*).

In what cases it may be wrongful (apart from conspiracy) to induce a person *not to make* contracts with another, cannot be said to be very clear. It obviously cannot be wrongful, for the purpose of obtaining a person's custom, to induce him not to deal with another, as this is an ordinary incident of legitimate trade competition. But it is submitted that a gratuitous interference on the part of an individual with the intention

(*u*) *Reed* v. *Friendly Society of Stonemasons*, [1902] 2 K. B. 732.
(*x*) *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K. B. 545, *per* Romer, L.J., at p. 574; affirmed, [1905] A. C. 239.
(*y*) *Giblan* v. *National, etc. Union*, [1903] 2 K. B. 600.

of injuring a person by preventing others from contracting with him would be an actionable wrong if damage resulted (*z*).

Trade Disputes.—By s. 3 of the Trade Disputes Act, 1906 (*a*), an act done by a person in contemplation or furtherance of a trade dispute (*b*) shall not be actionable on the ground only that it induces some other person to break a contract of employment. This statutory protection only extends to cases where there is a trade dispute (*b*), either actual, impending or probable; and if the act complained of be accompanied by threats or violence, the old common law liability remains untouched (*c*). But no action of tort will lie against a trade union (*d*).

Assignment of a Contract.—In many cases the contract may be assigned, and then its rights and duties go with it accordingly. Such assignment or devolution may take place by operation of law, or by act of parties. Amongst assignments by operation of law may be mentioned the assignment of a bankrupt's contracts to his trustee, of a deceased's contracts to his personal representative (*e*), and of covenants running with the land and the reversion. In dealing with an assignment by act of party the assignment of rights and the assignment of duties must be separately considered.

(*z*) See *Quinn* v. *Leatham*, *supra*; and *cf. Allen* v. *Flood*, *supra*. See also *per* Romer, L.J., in *Giblan* v. *National*, *etc. Union*, *supra*.

(*a*) 6 Edw. 7, c. 47.

(*b*) The expression "trade dispute" is defined by s. 5 (3) of the Act.

(*c*) *Conway* v. *Wade*, [1909] A. C. 506.

(*d*) 6 Edw. 7, c. 47, s. 4.

(*e*) These are exclusive of such as relate to purely personal services, rights, and liabilities (*Baxter* v. *Burfield* (1747), 2 Str. 1266).

Assignment of Rights.

Equitable Assignments.—Courts of equity always gave effect to assignments of debts and other choses in action (*f*), and an assignment for valuable consideration is complete in equity as between the assignor and assignee without the assent of, or notice to, the debtor. An equitable assignment may be created by any words which show an intention to transfer the benefit of the subject-matter. It "may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril. If the assignment be for value, and communicated to the third person, it cannot be revoked by the creditor, or safely disregarded by the debtor" (*g*). An assignment which does not comply with the requirements of the Judicature Act, 1873 (*gg*), may be a good equitable assignment.

Assignments under the Judicature Act.—At common law this could take place only with the assent of the debtor, or in accordance with the law

(*f*) A *chose in action* is a personal right of property which can only be enforced by action—as opposed to a *chose in possession*, viz., a thing in actual physical possession. Thus a debt, shares in a company, and rights of action arising out of contract or tort, are all choses in action.

(*g*) *William Brandts* v. *Dunlop Rubber Co.*, [1905] A. C., at p. 462, *per* Lord Macnaghten.

(*gg*) *Infra.*

merchant (*h*). So, unless the contract were one of a negotiable character (see *post*, p. 57), the right given by it could not be assigned; to transfer the right a new contract of a trilateral nature—frequently implied—was required, the result being a change of creditors. This may be styled a *noration* of the original contract. Now by the Judicature Act, 1873, s. 25 (6), it is provided that a debt or other legal chose in action may be assigned so as to entitle the assignee to sue in his own name, if (i) the assignment is absolute, and not by way of charge; (ii) the assignment is in writing; (iii) notice in writing has been given to the debtor.

The assignment is subject to any rights of third parties, or to counter-rights of the debtor (*e.g.*, set-off), or, as it is expressed, is "subject to equities" which would have been entitled to priority over the right of the assignee before the passing of the Act.

An absolute assignment of debts by way of mortgage with a proviso for redemption is within the benefit of the sub-section, whether made to secure a fixed and definite sum or a fluctuating balance of account (*i*). Future debts may be assigned, but an undefined portion of future debts cannot be so dealt with (*k*). The question whether an ascertained part of a debt can be assigned is the subject of conflicting decisions, and must await settlement by the Court of Appeal; but

(*h*) See remarks of Martin, B., in *Liversidge* v. *Broadbent* (1859), 4 H. & N. 603, 610.

(*i*) *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190.

(*k*) *Jones* v. *Humphreys*, [1902] 1 K. B. 10.

part of a judgment debt cannot be assigned so as to give the assignee a right to issue execution (*l*).

In *Torkington* v. *Magee* (*m*) the meaning of the term "legal chose in action" came up for discussion. It was held that the benefit of a contract for the sale of an interest in property could be assigned so as to entitle the assignee to sue in his own name for a subsequent breach of the contract to sell; but that the assignee could not sue unless his assignor was in a position to do so. Probably the expression includes all choses in action which were formerly treated as assignable by a Court of Equity. The sub-section must, however, be read with some limitations, and it apparently would not apply to a right to sue for damages in tort (*n*). "The section relates to procedure only. It does not enlarge the class of choses in action, the assignability of which was previously recognised either at law or in equity" (*o*).

Contracts involving personal confidence or ability cannot be assigned so as to shift the burden of the obligation. An artist cannot assign the benefit of a contract to paint a portrait because he cannot compel

(*l*) See *Forster* v. *Baker*, [1910] 2 K. B. 636; *Skipper and Tucker* v. *Holloway*, [1910] 2 K. B. 630.

(*m*) [1902] 2 K. B. 427; reversed on appeal without deciding the point of law, the Court of Appeal holding there was no breach of contract by the defendant, [1903] 1 K. B. 644.

(*n*) *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260. The right to recover compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), is a legal chose in action capable of assignment and not a claim to damages for a wrongful act (*ibid.*).

(*o*) *Per* Cozens-Hardy, L.J., in *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1902] 2 K. B., at p. 676. See also *per* Lord Lindley, *S. C.*, [1903] A. C., at p. 424.

the contractee to accept the work of any other artist, whether better or worse. In a contract for the sale of future goods on credit, the buyer cannot substitute the credit of his assignee; nor can any contract be assigned so as to impose on either party a burden exceeding that which he contracted to bear. In such cases, however, the assignment is good between assignor and assignee, but any action must be brought in the name of the assignor, and he must be ready and willing to perform himself all personal obligations (*p*). But even a contract for the sale of goods may be so personal in its nature as not to be capable of assignment (*q*).

Transfers of policies of insurance, shares in companies, debentures, etc., both as to the rights and duties thereunder, are dealt with specially by Acts of Parliament and Articles of Association.

Assignment of Duties.— A person cannot assign his obligation to perform a contract of any kind so as to shift from himself the liability for non-performance, although he may in many cases perform by the act of another. The exceptions to this are mainly statutory, but in case of contracts concerning land, certain liabilities run with the land—*i.e.*, bind the owner for the time being. But the person to whom performance is due may consent to a novation creating a new contract under which the original contractor gets his release and the liability of another is substituted.

(*p*) *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1902] 2 K. B. 660; on appeal, [1903] A. C. 414. The House of Lords affirmed the decision of the Court of Appeal on the simple ground that upon the true construction of the contract it was intended to be assignable.

(*q*) *Kemp* v. *Baerselman*, [1906] 2 K. B. 604.

A distinction must be drawn between assignability and negotiability. Negotiability implies (i) that the contract may be passed from hand to hand without notice of the transfer to the party under liability; (ii) that the bonâ fide transferee for value of a negotiable instrument holds it free from any defects in title which might have affected the prior holder, and not subject to equities. The law on this subject is dealt with in the chapter on "NEGOTIABLE INSTRUMENTS."

PERFORMANCE OF A CONTRACT.

Parties to the contract have, on the one hand, the right to have the contract performed, and, on the other, are obliged to perform. Performance should be complete, and according to the real effect of the agreement —*e.g.*, an agreement to pay a sum of money is not performed by mere readiness to pay, the debtor must go to his creditor and offer to pay (*r*). Where no time for performance is fixed, there is an implied undertaking that the performance shall be completed within a reasonable time, having regard to the circumstances of the particular case. Performance may be waived, and another method of performance substituted by mutual assent, in which case, if the creditor gets what he bargains for, the new performance is a satisfaction of the old contract. Thus, if a creditor agrees to accept services for money and the services are actually rendered, the old contract has been discharged by *accord and satisfaction* (*s*). A new contract, if made

(*r*) Co. Litt. s. 340; *Cranley* v. *Hillary* (1813), 2 M. & S. 120.

(*s*) There must be consideration for the new arrangement; therefore, a promise to pay a smaller sum instead of a larger, is not good

and accepted *in discharge* of the old liability, may, even if unperformed, be a good accord and satisfaction, the creditor having his remedy for breach of the substituted contract (*t*).

To an action for non-performance there are various defences, but these, as a rule, arise out of circumstances which are sufficient to avoid the arrangement, and will therefore be dealt with under "Termination of the Contract"—*e.g.*, impossibility. But *set-off* is not of such a nature. That is a right on the part of a defendant to avail himself of a debt due to him from the plaintiff in extinction or reduction of the claim in the action, and so to avoid the consequences of non-performance. Only liquidated demands can be set-off, and the debts must be due between the same parties and in the same right; claims, however, that cannot be raised by way of set-off may generally be made the subject of a counter-claim. Such questions belong rather to the law of procedure than of contract.

Payment.

This may be defined as the performance of a contract by delivery of money or of some negotiable instrument. It may be of two kinds—either absolute or conditional—*e.g.*, A. owes B. £20, he may pay this in gold, or by bill; if B. takes the gold or the bill in payment, this is full satisfaction; if he takes the bill subject to its being honoured at maturity, this is conditional payment (*u*).

satisfaction. See *ante*, p. 19. As to this subject, see Comyns' Dig. Accord. (B.) 4; *Good* v. *Cheesman* (1819), 2 B. & Ad. 335.

(*t*) *Hall* v. *Flockton* (1851), 16 Q. B. 1039.

(*u*) *Robinson* v. *Read* (1829), 9 B. & C. 455.

Method of Payment and Tender.—A debtor is bound to seek his creditor (*x*), and cannot claim to take time until demand has been made. This, of course, may be varied by special agreement, and then, in addition to the demand, the debtor is entitled to an allowance of a reasonable time to enable him to fetch the money (*y*).

When payment is made, the whole amount should be tendered (*z*), and without any objectionable conditions. A debtor who is always ready to pay and actually offers to do so in effect performs his contract, so that tender is a defence to an action if the money is brought into court. A tender may, however, be made *under protest*, so as to reserve any right of the debtor to dispute the amount (*a*). The amount must be tendered in a manner consistent with the *Coinage Act*, 1870 (*b*), in accordance with which the following is legal tender —(i) gold coins, which have been issued by the Mint, up to any amount; (ii) silver coins not over forty shillings; (iii) copper coins not over one shilling. By the Act 3 & 4 Will. 4, c. 98, s. 6, Bank of England notes are legal tender for all sums above five pounds, if the notes are payable on demand to bearer, so long as the bank shall continue to pay such notes in legal coin. But Bank of England notes are not legal tender in Ireland (*c*) or in Scotland (*d*), though their circulation in those countries is not prohibited. Country notes are

(*x*) *Fessard* v. *Mugnier* (1865), 34 L. J. C. P. 126.

(*y*) *Massey* v. *Sladen* (1869), L. R. 4 Ex. 13.

(*z*) *Dixon* v. *Clarke* (1847), 5 C. B. 365; *Cotton* v. *Goodwin* (1841), 7 M. & W. 147.

(*a*) *Scott* v. *Uxbridge Rail. Co.* (1866), L. R. 1 C. P. 596; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1.

(*b*) 33 Vict. c. 10, s. 4.

(*c*) 8 & 9 Vict. c. 37, s. 6. (*d*) 8 & 9 Vict. c. 38, s. 15.

good tender only with the assent of the creditor, and payment in country notes is treated on the same footing as payment in bills or notes in general (*e*). Further, the exact amount must be produced, as a creditor cannot be compelled to give change (*f*). But in all the above examples the creditor may waive his strict rights, and on slight evidence uncontradicted by other facts the courts would probably infer that he had done so—*e.g.*, a debtor offered to pay in country notes; the creditor objected on the ground of insufficiency of amount only; it was held that here the creditor waived his right as to the quality of the tender (*g*). Again, though the debtor must actually produce the money, if the creditor says, "Do not produce it; I will not take it if you do," the tender will be good (*h*).

If payment be made in accordance with the direction of the creditor, the debtor will not be liable if the money be lost, or if there be any want of formality in the method indicated—*e.g.*, a creditor sometimes directs his debtor to pay into a certain bank; if after the payment the bank fails, the debtor is discharged as fully as if he had paid the money into the hands of the creditor himself (*i*). But the debtor should be careful to carry out strictly the directions given; thus, if asked to send by post, he should not send by commissionaire (*k*). Again, where the debtor gives an order on a third person to pay to the creditor, the payment is complete

(*e*) *Lichfield Union* v. *Greene* (1857), 1 H. & N. 884.
(*f*) *Robinson* v. *Cook* (1816), 6 Taunt. 336.
(*g*) *Polglass* v. *Oliver* (1831), 2 Cr. & J. 15.
(*h*) *Douglas* v. *Patrick* (1789), 3 T. R. 683.
(*i*) *Eyles* v. *Ellis* (1827), 4 Bing. 112.
(*k*) *Hawkins* v. *Rutt* (1793), Peake, 186.

if the creditor, without consulting the debtor, arrange special terms with the third party, and in consequence loses the money (*l*). The following are examples of payments which are good, though not made in the usual way : money paid by consent of the creditor for his benefit by the debtor (*m*) ; payment in goods according to agreement (*n*).

A payment is made, and must be accepted, according to the wish of the payer (*o*), and if money be sent upon express terms, the creditor will, in the absence of strong evidence, be estopped from denying the terms upon which it has been paid. In *Day* v. *McLea* (*p*), a creditor received a cheque "in full of all demands," and accepted it "on account," and it was urged that he was estopped from denying it to be a full payment, but the court held that the question was one of fact, and that no presumption of law existed hostile to the creditor.

Payment by Bill or Note.—Apart from agreement the creditor cannot be compelled to take, nor the debtor to draw or accept, a negotiable instrument in payment. If a bill or note is taken, then in the absence of stipulation such payment is presumed to be conditional, and if the instrument is not taken up, the original liability

(*l*) *Smith* v. *Ferrand* (1827), 7 B. & C. 19, 24.

(*m*) *Waller* v. *Andrews* (1837), 3 M. & W. 312, 318.

(*n*) *Cannan* v. *Wood* (1836), 2 M. & W. 465, 467 ; but see the Truck Acts, 1831—1896, as regards workmen.

(*o*) See remarks of the judges in *Croft* v. *Lumley*, 5 E. & B. 648, 680, which, however, relate more particularly to appropriation of payments.

(*p*) (1889), 22 Q. B. D. 610. *Cf. Hirachand Punamchand* v. *Temple*, [1911] 2 K. B. 330, where an amount less than the debt paid by a third person was held to discharge it.

revives (*q*); while, if the bill is met, the payment relates back to the time when it was given (*r*). If a buyer offers cash, but the vendor prefers a bill, the payment is absolute, and all right of action upon the original consideration goes and the vendor must sue on the bill (*s*). If, owing to the negligence of the creditor, the negotiable instrument becomes valueless, the payment is treated as an absolute payment—*e.g.*, if a holder indorses a bill to his creditor by way of payment, and when the bill is dishonoured, the creditor fails to give proper notices of dishonour, and thereby releases the drawer and indorsers (*t*). If a bill which has been received by way of conditional payment (*e.g.*, for the price of goods) is dishonoured, the creditor may sue for the price, but the bill must be in his hands at the commencement of the action, otherwise the debtor might have to pay twice over (*u*).

Who may Pay.—It is the duty of the debtor to pay, but a third party may do so for him. In this latter case, the debtor should either give his authorisation or ratification (*x*), though either may be implied from the facts. Until such affirmation by the debtor, the money may be repaid to the payer, and then the original debtor's liability does not cease (*y*).

(*q*) If the debtor after giving a bill commits an act of bankruptcy, the original debt revives, though the bill has not yet matured (*Re Raatz*, [1897] 2 Q. B. 80).

(*r*) *Marreco* v. *Richardson*, [1908] 2 K. B., at p. 593 : *per* Farwell, L.J.

(*s*) *Cowasjee* v. *Thompson*, 5 Moo. P. C. 165.

(*t*) *Bridges* v. *Berry* (1810), 3 Taunt. 130.

(*u*) *Price* v. *Price* (1846), 16 M. & W. 232 ; *Davis* v. *Reilly*, [1898] 1 Q. B. 1.

(*x*) *Simpson* v. *Eggington* (1855), 10 Ex. 845, 847.

(*y*) *Walter* v. *James* (1871), L. R. 6 Ex. 124.

To whom Payment may be Made.—The payment should be made to the creditor, and if there are several joint creditors, then to any one of them. If one of several joint creditors collusively with the debtor forgives the debt, the release may be set aside by the court.

Payments may be made to the creditor's agent, if made (i) in and according to the usual course of business (*z*), and (ii) before the principal gives notice that he requires payment to be made to himself (*a*). In the latter case payment can be made to the agent only when he has a lien on the goods—*e.g.*, to a factor, in which case payment to the principal is of itself no defence to an action by the agent (*b*). The following are examples of decisions on payments :

To a factor—good (*c*).

To a broker—bad (*d*).

To a person sitting in an office and apparently having charge of the business—good (*e*).

To an auctioneer—it depends upon the conditions (*f*).

To a solicitor producing a deed having the receipt for the consideration money in it or indorsed on it, and executed or signed by the person entitled to give a receipt—good (*g*).

(*z*) *Saunderson* v. *Bell* (1834), 2 C. & M. 304 ; *Catterall* v. *Hindle* (1867), L. R. 2 C. P. 186.

(*a*) *Gardiner* v. *Davis* (1825), 2 C. & P. 49.

(*b*) *Williams* v. *Millington* (1788), 1 H. Bl. 81 ; *Robinson* v. *Rutter* (1855), 4 E. & B. 954.

(*c*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251 ; *Fish* v. *Kempton* (1849), 7 C. B. 687.

(*d*) *Baring* v. *Corrie* (1819), 2 B. & Ald. 137 ; *Montagu* v. *Forwood*, [1893] 2 Q. B., at p. 355.

(*e*) *Barrett* v. *Deare* (1828), M. & M. 200.

(*f*) *Sykes* v. *Giles* (1839), 5 M. & W. 645.

(*g*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56 ; and see *Day* v. *Woolwich Equitable Building Society* (1889), 40 Ch. D. 491.

To trustees—good, if receipt in writing is obtained (*h*).

Appropriation of Payments.—If a debtor owes more than one debt to a creditor, and makes a payment insufficient to satisfy the whole, the money is appropriated as follows :

1. To whichever debt the debtor desires, provided he exercises his option at the time of payment ;
2. If he does not elect, the creditor may do so at any time ;
3. If there be a current account between the parties the presumption is that payments have been appropriated to the items in order of date ; but the presumption may be rebutted (*i*).

"There is an established maxim of law that, when money is paid, it is to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him" (*k*). The appropriation may be by word or by conduct—*e.g.*, if the debtor owes two debts, one of £30 and another of £37 10*s.*, and pays the latter sum, it will be presumed that the latter is the debt intended to be paid (*l*).

The creditor may appropriate when the debtor has not done so, but the debtor must first have had

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20.

(*i*) *The Mecca*, [1897] A. C. 286 ; *Clayton's Case* (1816), 1 Mer. 585, 608.

(*k*) Campbell, C.J., in *Croft* v. *Lumley* (1858), 5 E. & B. 648.

(*l*) *Marryatts* v. *White* (1817), 2 Stark. 101.

an opportunity of electing; so if a debtor's money come to a creditor's hands, the right of the latter to apply it to a particular debt will arise only after the former has had knowledge of the circumstances (*m*). The creditor's appropriation is revocable till communicated; so if he enter a payment to a certain debt, he can afterwards alter this, unless he has disclosed the account (*n*). "If the debtor does not appropriate it, the creditor has a right to do so to any debt he pleases, and that not only at the instant of payment, but up to the very last moment" (*o*). He may even appropriate when being examined as a witness in an action brought by him against the debtor (*p*). There is in this respect no difference between a specialty and a simple contract debt, and if both exist the creditor may appropriate to either. If there is a real debt, the creditor may appropriate the payment to it, though the right of action be gone—*e.g.*, a debt barred by the Statute of Limitations (*q*). The creditor must, however, have some legal or equitable claim, though it may not be enforceable by action; he cannot appropriate a payment to a demand arising out of a contract forbidden by law (*r*), nor does his right to appropriate remain after a judgment which does not give effect to it (*s*).

(*m*) *Waller* v. *Lacy* (1840), 1 M. & G. 54.

(*n*) *Simson* v. *Ingham* (1823), 2 B. & C. 65.

(*o*) BLACKBURN, J., in *City Discount Co.* v. *McLean* (1874), L. R. 9 C. P. 692, 700; *The Mecca*, *supra*.

(*p*) *Seymour* v. *Pickett*, [1905] 1 K. B. 715.

(*q*) *Mills* v. *Fowkes* (1839), 5 Bing. N. C. 455.

(*r*) *Lamprell* v. *Guardians of Billericay Union* (1878), 3 Ex. D. 283, 307; *Wright* v. *Laing* (1824), 3 B. & C. 165.

(*s*) *Smith* v. *Betty*, [1903] 2 K. B. 317.

Where there is an account current between the parties—*e.g.*, a banking account—the general rule is that payments extinguish the earlier items of debt (*t*). "If there is nothing to show a contrary intention, the items of credit must be appropriated to the items of debit in order of date" (*u*). This, however, is but a presumption, and it may be rebutted by evidence showing a contrary intention (*x*). "A particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case" (*y*). To avoid the general rule all that is required is to break the account and open a new one—make two or more accounts instead of the one general and current (*z*).

As against his *cestui que trust* a trustee who has mixed trust money with his own moneys in his banking account may not set up the rule in *Clayton's Case*, and it will be presumed that in drawing from the bank he drew on his own and not on the trust money (*a*); but the ordinary rule must be applied as between two *cestuis que trust*, both of whose funds have been paid in and partly drawn out of his bank by the trustee (*b*).

Receipts.—A receipt is the best evidence of payment, but it is not the only evidence, nor is it, unless under

(*t*) *Clayton's Case* (1816), 1 Mer. 585, 608; *Bodenham* v. *Purchas* (1819), 2 B. & Ald. 39.

(*u*) Blackburn, J., in *City Discount Co.* v. *McLean* (1874), L. R. 9 C. P. 692, 701.

(*x*) See *Deeley* v. *Lloyd's Bank*, [1910] 1 Ch. 648, where the evidence was held to be sufficient to rebut the presumption in the case of an ordinary banking account, although no fresh account had been opened.

(*y*) *Henniker* v. *Wigg* (1869), L. R. 4 Q. B. 792; *Re Hallett* (1880), 13 Ch. D. 696.

(*z*) Remarks of Lord Selborne. *In re Sherry* (1884), 25 Ch. D. 692.

(*a*) *Re Hallett's Estate* (1880), 13 Ch. D. 696.

(*b*) *Re Stenning*, [1895] 2 Ch. 433.

seal, conclusive in favour of the payer—*e.g.*, its effect may be rebutted by evidence; it may be upset by proof of error. It has been questioned (in cases of tender) whether or not a receipt can be demanded as of right (*c*), but the decisions under earlier statutes may not now apply, as by the Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 101—103, the duty of stamping is primarily thrown on the creditor; this renders him liable to a penalty if he refuses to give a receipt, or gives one improperly stamped, and it seems that demanding the performance of a statutory duty ought not to invalidate a tender.

Right to Interest.

There is no implication at common law of an agreement to pay interest, except in the case of certain commercial instruments—*e.g.*, bills of exchange (*d*). Thus, for example, interest will not, in the absence of agreement, be allowed on the following: a guarantee (*e*), an account stated for goods sold (*f*). But there are exceptions to the rule, for in the following cases interest — *i.e.*, simple interest (compound interest is never allowed, unless by express or implied contract (*g*))—is chargeable:

(1) Where there is an express or implied agreement;

(*e*) *Laing* v. *Meader* (1824), 1 C. & P. 257; *Richardson* v. *Jackson* (1841), 8 M. & W. 298.

(*d*) The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57, now regulates this.

(*e*) *Hare* v. *Rickards* (1830), 7 Bing. 254.

(*f*) *Chalie* v. *Duke of York* (1806), 6 Esp. 45. *Aliter*, apparently for money lent (*Blaney* v. *Hendricks* (1771), 2 W. Bl. 761).

(*g*) *Fergusson* v. *Fyfe* (1841), 8 C. & F. 121.

(2) Where the usage of trade allows it;

(3) On money due on awards and payable on a certain day and properly demanded (*h*);

(4) On a bond with a *penalty* (*i*);

(5) As against the principal debtor, on money paid by a surety (*k*);

(6) Upon money obtained by fraud and retained by fraud (*l*);

(7) By statute 3 & 4 Will. 4, c. 42, s. 28, interest at the current rate may be allowed by way of damages on all debts or sums certain payable at a certain time by virtue of a written instrument; or if payable otherwise from the date of a written demand for payment giving notice that interest will be claimed from the date of demand until payment. The "sum certain payable" must be one which is due absolutely and in all events to the creditor (*m*). If interest is given under this section, the rate is usually 5 per cent. per annum; but this is not invariable (*n*).

(8) On a judgment debt interest runs at 4 per cent. until the judgment is satisfied (*o*).

(*h*) *Johnson* v. *Durrant* (1819), 4 C. & P. 327; *Pinhorn* v. *Tuckington* (1811), 3 Camp. 468.

(*i*) *Hogan* v. *Page*, 1 B. & P. 337; *Cameron* v. *Smith* (1819), 2 B. & Ald., at p. 308.

(*k*) *Petre* v. *Duncombe* (1851), 20 L. J. Q. B. 242.

(*l*) *Johnson* v. *Rex*, [1904] A. C. 817.

(*m*) *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A. C. 429.

(*n*) See remarks of Kekewich, J., in *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 129; and see *per* Lindley, L.J., at p. 133.

(*o*) 1 & 2 Vict. c. 110, s. 17.

(9) When by Act of Parliament it is provided that interest shall be payable. The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), for instance, provides that interest from time of maturity, or (in the case of a bill payable on demand) from date of presentment for payment, shall be payable by the party liable on a dishonoured bill (*p*).

Though money owing to a person be wrongfully withheld, interest cannot be recovered unless the party to whom the money is due brings his case within one of the exceptions above named.

Money-lenders Act, 1900.—Since the abolition of the usury laws, interest may be legally charged at any rate agreed upon by the parties to a contract. But under the Money-lenders Act, 1900 (*q*), the transactions of a money-lender may be reopened by the court if the interest or charges are excessive and the transaction is harsh and unconscionable, or such that a court of equity would give relief. In such cases the court may, having regard to the risk and all the circumstances, adjudge what sum is fairly due for principal, interest, and charges, and relieve the borrower or his surety from payment of the excess (*r*). The Act only applies to a person whose business is that of money-lending, or who in any way holds himself out as carrying on that business; it does not affect the transactions of pawnbrokers, bankers and others, nor the contract of a person making a loan in the course of and for the

(*p*) Section 57.
(*q*) 63 & 64 Vict. c. 51.
(*r*) Section 1.

purposes of a business not having for its primary object the lending of money (*s*).

After considerable conflict of judicial opinion, the case of *Samuel* v. *Newbold* (*t*), in the House of Lords, has finally settled upon what principles the Act is to be construed, and to what cases its remedial provisions apply. It undoubtedly extends to cases in which a court of equity would not formerly have granted relief. The policy of the Act was to enable the court to prevent oppression, leaving it in the discretion of the court to weigh each case upon its own merits, and to look behind a class of contracts which peculiarly lend themselves to an abuse of power. Excessive interest (without any other element of unfairness, over-reaching or coercion) may of itself be evidence that the bargain is harsh and unconscionable, and, if established, the onus is thrown upon the money-lender to prove any facts which may justify his apparently excessive charges.

A money-lender must be registered in his own or usual trade name, and carry on business in the registered name and at the registered address (*u*). The "usual trade name" must not be one assumed for the first time for the purpose of registration, and partnerships must be registered in the names of the individuals who constitute them (*x*). It is always a question of fact at what place the business is carried on, and the Act does not mean that every step and every incident of every piece of the money-lending business must be

(*s*) Section 6. See, for example, *Litchfield* v. *Dreyfus*, [1906] 1 K. B. 584.

(*t*) [1906] A. C. 461.

(*u*) Section 2.

(*x*) *Whiteman* v. *Sadler*, [1910] A. C. 514.

transacted at the registered office. Thus, the money may be handed over and the security perfected at the house of the borrower, if the business is really controlled and directed at the registered address (*y*).

Contracts by a money-lender who has not registered his name under the Act, or contracts made in some other name than that which has been registered, are *illegal* (*z*). In such cases repayment of the loan cannot be enforced, and any security given for it must be restored, the borrower being a person whom the Act was designed to protect, and therefore entitled to recover, notwithstanding the illegality of the transaction (*z*). If the security is valid, the transaction cannot be opened as against a bonâ fide assignee for value without notice (*a*); but if the security is invalid, such an assignee is in no better position than the money-lender (*b*).

Breach of Contract.

Total Breach.—Upon breach of contract there is always a right of action for damages, and though no actual damage can be proved, nominal damages will be given. If the contract *as a whole* is broken, the injured party has several remedies: (i) he may treat the breach as a discharge, refuse to perform his part, and resist successfully any action brought upon the contract; (ii) he may bring a claim for damages either by an action of his own, or by way of counterclaim in an

(*y*) *Kirkwood* v. *Gadd*, [1910] A. C. 514.

(*z*) *Victorian Daylesford Syndicate, Limited* v. *Dott*, [1905] 2 Ch. 624; *Bonnard* v. *Dott*, [1906] 1 Ch. 740.

(*a*) Section 2 (5).

(*b*) *Re Robinson*, [1910] 2 Ch. 751.

action brought against him by the other party; (iii) he may, if he has performed any part of the agreement, bring an action for an amount equivalent to the work done: this is called suing on a *quantum meruit*, and the claim should be coextensive with the work done (*c*); (iv) in certain cases he may bring an action for specific performance.

Partial Breach.—If the non-performance goes only to a part of the contract, the rights of the injured party are much more difficult to determine. If the non-performance of a particular portion of a contract be so far of the essence of the contract as to imply a virtual failure of the consideration, then the injured party will be discharged from further performance on his part: otherwise he must seek his remedy in damages for the particular breach (*d*). "The rule of law . . . is that, where there is a contract in which there are two parties, each side having to do something. . . . If you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going to perform my part of it.' . . . But Mr. Cohen contended that whenever there was a breach of a material part of the contract, it necessarily went to the root of the matter. I cannot agree with that at all" (*e*).

Frequently it happens that the contract is easily divisible into various stipulations—*e.g.*, to deliver cargo

(*c*) *Farnsworth* v. *Garrard* (1807), 1 Camp. 38; *Planché* v. *Colburn* (1831), 8 Bing. 14.

(*d*) See notes to *Pordage* v. *Cole* (1669), 1 Wm. Saund. 548 (ed. 1871).

(*e*) Lord Blackburn in *Mersey Steel and Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434, 443.

at certain stated intervals, on March 1st, April 1st, and so on, in which case, in the event of breach of one of them, the general rule is that the remedy must be by action. If, however, the parties expressly agree that breach of a single term shall entitle the other party to treat the contract as abandoned, the general rule is inapplicable (*f*). And if a party shows by his acts, or otherwise, an intention not any longer to be bound by his contract, this gives the other a right to refuse further performance, though, so far, one term only has been broken. "The real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract" (*g*). Thus, plaintiff agreed to buy of defendants some iron, to be delivered in two instalments, net cash within a fortnight of delivery: after delivery, and when the first payment was due, plaintiff refused to pay, urging a set-off for late delivery:—*Held*, that this did not exhibit an intention to break the entire contract, so as to justify the defendant's refusal to continue performance; his remedy was in damages for breach of contract (*h*). The House of Lords approved the principle in *Mersey Steel and Iron Co.* v. *Naylor* (*i*).

If the broken stipulation is quite independent of the remainder of the contract, or if the agreement of the one party is made in consideration of the agreement

(*f*) *Cutter* v. *Powell* (1807), 2 Sm. L. C. 1.

(*g*) Lord Coleridge in *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208, 213.

(*h*) *Freeth* v. *Burr*, *supra*; see also *Withers* v. *Reynolds* (1819), 2 B. & Ad. 882; *Simpson* v. *Crippin* (1873), L. R. 8 Q. B. 14; and *cf. Honck* v. *Muller* (1881), 7 Q. B. D. 92.

(*i*) (1884), 9 App. Cas. 434.

(and not of the performance) of the other party, the only remedy is in cross actions for damages. The modern tendency is against such a construction of the contract, but even in recent times cases of the kind are to be found (*k*). Thus, if A. agrees to build B. a house, payment to be made on January 1st, and the payment is not made, A. may sue B., but he cannot refuse to build.

In some cases the contract will include *subsidiary promises*, amongst which may be mentioned warranties. These are dealt with later in the treatment of the contract of sale (*l*), and also in connection with marine insurance (*m*). The difficulty is to determine whether a certain stipulation amounts to a condition, or to a warranty merely, and the question is of importance inasmuch as the breach of a condition will generally be ground for avoidance of the contract, whilst the ordinary remedy for a breach of warranty will be an action for damages.

As regards conditions, these may be precedent or concurrent. If a condition is concurrent, each party should perform his agreement at the same time—*e.g.*, in *Bankart* v. *Bowers* (*n*), A. agreed to buy a mine from B., and B. agreed to purchase all coal from A. A. sued B. for not taking coals, but it was held that the acts provided for by the contract were to be concurrent, and that the plaintiff A. must show that he had performed, or at any rate was ready to perform, his part of the agreement (*o*). A condition precedent

(*k*) See *Mattock* v. *Kinglake* (1839), 10 A. & E. 50.
(*l*) *Post*, pp. 255, 260.
(*m*) *Post*, pp. 397—400. (*n*) (1866), L. R. 1 C. P. 484.
(*o*) And see *Morton* v. *Lamb* (1797), 7 T. R. 125.

differs from a warranty ; the latter is a collateral undertaking ; but though collateral a part of the contract. A condition precedent is where some act must be performed, or some event happen, or some time elapse before the one party is entitled to demand performance from the other. The answer to the question "condition or warranty?" seems therefore to depend upon the circumstances and construction of the particular agreement.

Anticipatory Breach. — Subject to what has been stated above, the renunciation of a contract by one party entitles the other to treat the contract as improperly rescinded, and he may sue at once for damages, though the time of performance has not yet arrived, but he must in such case treat the contract as at an end (*p*). For an example, see *Hochster* v. *De la Tour* (*q*), where plaintiff on April 12th was engaged to act as courier to the defendant, the employment to begin in June. In May the defendant wrote to inform plaintiff that his services would not be required, and an action was at once commenced, although June had not arrived. It was held that the action would lie. "Where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation" (*r*). Probably a contract containing various stipulations cannot be put

(*p*) *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460.

(*q*) (1853), 2 E. & B. 678.

(*r*) *Hochster* v. *De la Tour* (1853), 2 E. & B., at p. 689 : *per* Lord Campbell, C.J. See also *Frost* v. *Knight* (1872), L. R. 7 Ex. 111.

an end to, and an action brought upon it for an anticipatory breach, merely on account of repudiation of one of the terms (*s*).

Renunciation during performance will have a similar effect. In *Cort* v. *Ambergate Rail. Co.* (*t*), the plaintiffs agreed to supply the defendants with 3,900 tons of railway chairs at a certain price, the chairs to be delivered in certain quantities on certain dates. These were partially delivered, when the defendants said they would take no more. It was held that an action could be brought at once, without showing an actual delivery, mere readiness to deliver being sufficient. Lord Campbell said: "When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, give notice to the vendor not to manufacture any more as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract."

If the one party makes the performance impossible, this also gives an immediate right to treat the contract as at an end and sue for damages. In *Lovelock* v. *Franklyn* (*u*), the defendant agreed to assign his interest in a lease to the plaintiff, but before the date agreed upon for performance arrived, he assigned to another.

(*s*) *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460. Unless, perhaps, the repudiated stipulation goes to the whole consideration of the contract.

(*t*) (1851), 17 Q. B. 127.

(*u*) (1846), 8 Q. B. 371.

It was held that the plaintiff could bring an action without waiting the expiration of the time.

If A. agrees with X. to do an entire work (*e.g.*, to build, or to serve for a fixed time) for a specified sum, and the entire work is not carried out, there is a breach which exonerates X., and A. cannot successfully sue on a *quantum meruit* as on a partly finished work, save where it was so agreed, or save where it can be shown that the non-fulfilment was caused by the fault of X. (*x*). So a builder who abandons an entire contract to erect houses after partly constructing them can recover nothing, even though the owner takes the benefit of his work by completing the buildings (*y*). The performance of the whole work is in such cases a condition precedent to the right to sue.

Damages.—If no sum is mentioned, the amount of damages will be left to the decision of a jury or of a judge, and the amount claimed will be styled unliquidated damages.

If a sum is named in the contract as the amount to be paid by the defaulting party upon breach of contract, this sum may be either liquidated damages, or it may be a penalty. Liquidated damages are an assessment of the amount which, in the opinion of the parties, will compensate for the breach, and the court will, in the event of breach, award this amount of compensation. A penalty is an imposition laid on with a view to secure performance, and the courts will order only so much of

(*x*) *Cutter* v. *Powell* (1807), 2 Sm. L. C. 1; *Appleby* v. *Myers*, L. R. 2 C. P. 651.

(*y*) *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673. See also *Forman & Co.* v. *The Ship "Liddesdale,"* [1900] A. C. 190.

it to be paid as will compensate for the loss actually sustained by the injured party. In determining whether the sum fixed is in the nature of damages, or of a penalty, the court looks not to the name by which the parties have called it, but to the actual nature of the thing—*e.g.*, if the parties fix a very large sum, and call it damages for non-payment of a small sum, the court will regard it as a penalty (*z*) ; and the same view will be taken by the court if the sum fixed is extravagant, exorbitant or unconscionable in regard to any possible amount of damages or any kind of damage which may be conceived to have been within the contemplation of the parties when they made the contract (*a*).

In considering whether a named sum agreed to be paid on breach of contract is a penalty or liquidated damages, the test "appears to be, whether the loss which will accrue to the plaintiff from an infringement of contract can, or cannot, be accurately or reasonably calculated in money antecedently to the breach. If it can be so calculated, then the fixing of a large sum of money will be treated as a penalty. Where the loss is absolutely uncertain it will be treated as liquidated damages" (*b*). Further, a sum payable on one event only will in general be regarded as liquidated damages ; but if payable on the breach of one or more stipulations of different degrees of importance, the presumption is that the parties intended the sum to be penal (*c*).

(*z*) See *Kemble* v. *Farren* (1829), 6 Bing. 141.

(*a*) *Clydesdale, etc. Co.* v. *Yzquierdo y Castaneda*, [1905] A. C. 8.

(*b*) Mayne on Damages (8th ed.), p. 175.

(*c*) *Elphinstone* (*Lord*) v. *Monkland, etc. Co.* (1886), 11 App. Cas. 332 ; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127 ; *Strickland* v. *Williams*, [1899] 1 Q. B. 382 ; *Willson* v. *Love*, [1896] 1 Q. B. 628 ; *Pye* v. *British Automobile Syndicate*, [1906] 1 K. B. 425.

Damages are assessed in accordance with the following rules :

(1) The injured party is, so far as money can do it, to be placed as far as possible in the same situation as if the contract had been performed (*d*) ; subject to the qualification that—

(2) "The damages should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it" (*e*).

Any damage which is not within the rule in *Hadley* v. *Baxendale* (*e*) is said to be "too remote" ; although it may in fact arise from the breach of contract. An estimate of damage may be based on probabilities, but the court will not award damages of a problematical character upon the assumption that numerous events of a contingent nature would have happened (*f*).

(3) If there is special loss, not falling within either branch of the preceding rule, damages on this head can be awarded only if there is an actual contract to be responsible therefor (*g*).

(*d*) *Robinson* v. *Harman* (1876), 1 Ex. D. 855 ; *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A. C. 301.

(*e*) *Hadley* v. *Baxendale* (1874), L. R. 9 Ex. 341 ; Mayne on Damages (8th ed.), pp. 12 *et seq.*

(*f*) *Sapwell* v. *Bass*, [1910] 2 K. B. 486.

(*g*) *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131.

(4) Damages may be assessed for prospective as well as incurred loss (*h*).

Specific Performance.—This is a remedy granted formerly by courts of equity, but now by all courts, where damages of themselves will not be a sufficient compensation. It is used mostly with regard to contracts concerning land, but in certain cases the courts will compel performance of other contracts. Thus, a contract for the sale of a thing of rare beauty, or of one with regard to which there is a fancy value—*e.g.*, heirlooms—will be ordered to be specifically performed (*i*). But specific performance of an agreement will not be granted (1) if the agreement is made without consideration, (2) if the court cannot supervise the execution, (3) if it is inequitable, (4) if it would be unenforceable against the person asking for specific performance.

Termination of the Contract.

A contract which is in existence may be terminated in one of the following ways:

(i) By Agreement.

This may be (1) by substitution of a fresh agreement for the original, operating as a discharge of the earlier contract (*k*); or (2) by a simple agreement to rescind before breach (*l*); or (3) by release after breach.

(*h*) See *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351.

(*i*) *Dowling* v. *Betjemann*, 2 J. & H. 544. See also Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52, *post*, p. 264.

(*k*) *Ante*, pp. 57, 58.

(*l*) *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, 65.

Unless supported by good consideration, the release of a cause of action already accrued (except in the case of bills of exchange and promissory notes) must be by deed (*m*) ; but if there be consideration, a parol release will be effective by way of accord and satisfaction.

If there are several creditors to one contract, release by any one is valid against all, but the court will restrain any abuse of this power. And, as a general rule, a release of one of several joint debtors will release all ; but here, again, the courts will so construe the release as best to carry out the intention of the parties (*n*).

A contract may also be said to be discharged by agreement, when it terminates owing to the occurrence of an event, on the happening of which it was previously agreed that all rights and liabilities should cease—*e.g.*, A. agrees to be bound to B. for £500, but if he does a certain act, the bond is to be void. Upon his doing this act, A. and B. are freed one from the other ; the contract is at an end.

(ii) By Performance.

See *ante*, pp. 57 *et seq.*

(iii) By Breach.

See *ante*, pp. 71 *et seq.*

(iv) By Lapse of Time.

Lapse of time does not put an end to the contract, but it may bar the right to bring an action to enforce

(*m*) *Lodge* v. *Dicas* (1820). 3 B. & Ald. 611, 614. As to bills, see *post*, p. 335.

(*n*) Bac. Abr. Release (A).

the contract, for by the Limitation Act, 1623 (*o*), s. 3, it was enacted that all actions on parol contracts (with an exception since repealed (*p*)), shall be "commenced and sued within six years next after the cause of such action or suit, and not after."

By the Civil Procedure Act, 1833 (*q*), s. 3, the action upon a contract under seal must be brought within twenty years from the cause of action arising.

By the Real Property Limitation Act, 1874 (*r*), s. 8, it is provided that no action, suit, or other proceeding shall be brought to recover any sum of money secured by any legacy, judgment, mortgage, or lien, or otherwise charged upon or payable out of any land, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge or release for the same. It should be noted that this Act applies to the personal covenant in a mortgage deed as well as to the remedy against the land, so that in such cases the remedy on the specialty is barred after the lapse of twelve years (*s*).

Since under these statutes the right is not destroyed, though the remedy by action is taken away, so that no action can be brought, the contract still exists, and a lien in respect of it will not be destroyed (*t*). The

(*o*) 21 Jac. 1, c. 16.

(*p*) 19 & 20 Vict. c. 97, s. 9. This affects the bearing of the Statute of Limitations on merchants' accounts.

(*q*) 3 & 4 Will. 4, c. 42.

(*r*) 37 & 38 Vict. c. 57.

(*s*) *Sutton* v. *Sutton* (1883), 22 Ch. D. 511; *Fearnside* v. *Flint*, *ibid.* 579. There is, however, no Statute of Limitation applicable to a mortgage of personal property, so that after the debt is barred the security may still be enforced by foreclosure or sale (*London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161).

(*t*) *Higgins* v. *Scott* (1819), 2 B. & Ad. 413.

original agreement may be revived by an acknowledgment, and for this no further consideration is needed (*u*). If, moreover, the contract is performed, the performance will be good, and rights acquired thereby will remain valid, and cannot be rescinded.

The time counts from the day when the plaintiff can bring his action—*e.g.*, when the money becomes due and when the debt can first be recovered by action (*x*); accordingly, where the defendant was a foreign ambassador and privileged from being sued, the statute did not begin to run against the plaintiff until the defendant ceased to be ambassador (*y*).

The running of the statute may be suspended if the parties are under certain disabilities. A plaintiff who, when the cause of action arises, is under twenty-one years of age, or is a *feme covert* (*z*), or is *non compos mentis*, has six (or twenty) years after these disabilities have ceased wherein to bring action (*a*). But where the time has once begun to run, no subsequent disability will suspend the operation of the Statute of Limitations (*b*). If, however, there are several joint creditors, the disability of some will be no answer by the others for neglect in bringing the action within the time.

If the *defendant* is beyond the seas when the cause of action arises (Ireland not to be so considered) the

(*u*) *Ante*, p. 21.

(*x*) *Hemp* v. *Garland* (1843), 4 Q. B. 519; *Reeves* v. *Butcher*, [1891] 2 Q. B. 509.

(*y*) *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352.

(*z*) But since the Act of 1882 a married woman has become *discovert* within the meaning of the Statute of Limitations, and this disability can no longer be said to exist (*Lowe* v. *Fox* (1885), 15 Q. B. D. 667).

(*a*) 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 42, s. 4; as modified by 19 & 20 Vict. c. 97, s. 10.

(*b*) *Homfray* v. *Scroope* (1849), 13 Q. B. 509, 512.

statute will not run against the plaintiff until the defendant's return (*c*). But if any defendants are in the jurisdiction, these must be proceeded against without waiting the return of the others (*d*).

If the plaintiff was ignorant of his rights, and the cause of such ignorance was the fraud of the defendant, and a fraud which could not, with the exercise of reasonable diligence, have been discovered before, then the time allowed by the Statutes of Limitations commences to run from the discovery of the fraud (*e*). On the other hand, where money has been paid under a mistake of fact, the statute begins to run from the date of payment, and not from the date when the payment was actually discovered, nor from the date when it might have been discovered by the exercise of reasonable diligence (*f*).

Revival of the Remedy.—Although the right of action is barred by lapse of time, it may be revived by acknowledgment of the debt, or by (what is much the same) part payment.

Acknowledgment at one time could be made verbally. Now, by Lord Tenterden's Act, it is enacted that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of [the Statute of Limitations (*g*)], or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in

(*c*) 4 & 5 Anne, c. 3, s. 19; 3 & 4 Will. 4, c. 42, s. 4; *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352.

(*d*) 19 & 20 Vict. c. 97, s. 11.

(*e*) *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59.

(*f*) *Baker* v. *Courage & Co.*, [1910] 1 K. B. 56.

(*g*) 21 Jac. 1, c. 16.

some writing to be signed by the party chargeable thereby" (*h*); or his agent duly authorised thereto (*i*).

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), further enacts that a payment of principal or interest by one co-contractor shall be good to renew the remedy as against himself, but against himself alone (*k*); but the benefit of this provision is confined to certain specified Acts, viz., 21 Jac. 1, c. 16. s. 3 (*l*); 3 & 4 Will. 4, c. 42, s. 3 (*m*); and 16 & 17 Vict. c. 113, s. 20 (*n*).

The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5, contains provisions as to written acknowledgments of debts due under deeds, but barred by the earlier sections of the same statute. Under this section an acknowledgment in writing by one of several joint debtors revives the remedy against them all (*o*).

An important question in practice is—What is a sufficient acknowledgment?

If there be an absolute unconditional acknowledgment of the debt and nothing more, the law implies a promise to pay; but if there be an acknowledgment of the debt coupled with a promise to pay, the question arises whether the promise is conditional or unconditional (*p*). If the promise is conditional, it must be shown that the condition has been fulfilled (*q*). So, if

(*h*) 9 Geo. 4, c. 14, s. 1.

(*i*) 19 & 20 Vict. c. 97, s. 13.

(*k*) *Ibid.*, s. 14.

(*l*) *Ante*, pp. 81, 82.

(*m*) *Ante*, p. 82.

(*n*) *In re Lacey*, [1907] 1 Ch., at pp. 343, 350.

(*o*) *Read* v. *Price*, [1909] 2 K. B. 724.

(*p*) *Tanner* v. *Smart*, 6 B. & C. 603; *Smith* v. *Thorne* (1852), 18 Q. B. 134; *Chasemore* v. *Turner* (1875), L. R. 10 Q. B., at pp. 506, 507.

(*q*) *Re River Steamer Co.* (1871), 6 Ch. 828, *per* MELLISH, L.J.

the acknowledgment be accompanied by a refusal to pay (*r*), or a statement that the debt cannot be sued on (*s*), the statute will still operate to bar the remedy; but an unconditional acknowledgment coupled with an expression of hope that the debtor will be able to pay, is sufficient (*t*). The acknowledgment also must be made before action brought (*u*), and if lost, its contents may be proved by oral evidence (*v*).

A further way of reviving the remedy is by part performance or payment of the debt due on the contract; but here also the act must be clearly referable to the contract, and be done in such a way as to raise a promise to perform or pay the residue. Thus, when the debtor in paying part, showed that he considered himself to be paying all, there being nothing to show that he intended to pay the rest, it was held that he was entitled to rely upon the statute (*x*). When part payment is made by bill or cheque, the statute runs from the date when the instrument is handed to the creditor, and not from the date of its actual payment (*y*). Acknowledgment or payment to a person other than the creditor or his agent will not suffice to get rid of the statute (*z*).

(v) Impossibility.

If the contract be to do an obviously impossible act —*e.g.*, to touch the sky—it is clearly void *ab initio*;

(*r*) *Linley* v. *Bonsor* (1836), 2 Scott, 399, 403.
(*s*) *Rowcroft* v. *Lomas* (1816), 4 M. & S. 457.
(*t*) *Cooper* v. *Kendall*, [1909] 1 K. B. 405.
(*u*) *Bateman* v. *Pinder* (1842), 3 Q. B. 574.
(*v*) *Read* v. *Price*, [1909] 2 K. B. 724.
(*x*) *Foster* v. *Dawber* (1851), 6 Ex. 839, 853; 20 L. J. Ex. 385, 392.
(*y*) *Marreco* v. *Richardson*, [1908] 2 K. B. 584.
(*z*) *Stamford, etc. Banking Co.* v. *Smith*, [1892] 1 Q. B. 765.

and so if the subject-matter has ceased to exist at the time of contract (*a*).

If the impossibility arises subsequently to the making of the contract, it will, in the absence of agreement to the contrary, be no excuse if in its nature the performance might have been possible (*b*). In *Kearon* v. *Pearson* (*c*), a man agreed to deliver a cargo on board in the usual time ; but owing to delays caused by ice, the carrying out of this promise was rendered impossible. It was held that this did not put an end to the contract or the condition. So, in *Jones* v. *St. John's College* (*d*), a contractor agreed to finish and to do alterations in a certain time. The alterations demanded were such as to make it impossible to finish in the specified time ; but this impossibility was not admitted as an excuse, the court saying that he might have made allowance for such an event in his contract. The following are exceptions to the above rule :

(i) Where the impossibility is caused by law—*e.g.*, if after the contract is made an Act of Parliament is passed rendering the performance illegal (*e*).

(ii) When the performance depends upon the continued existence of a given person or thing, the existence of which the parties must from the beginning have known to be necessary to the fulfilment of the contract, a condition is implied, that impossibility arising from the perishing of the person or thing without default of the party liable to perform the contract, shall excuse

(*a*) *Couturier* v. *Hastie* (1856), 5 H. L. Cas. 673.
(*b*) *Taylor* v. *Caldwell* (1862), 3 B. & S., at p. 833.
(*c*) (1861), 7 H. & N. 386.
(*d*) (1871), L. R. 6 Q. B. 115.
(*e*) *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180.

the performance (*f*), whether the person or thing actually perishes or ceases to exist in a condition fit for the purpose of the contract (*g*)—*e.g.*, a lady agreed to play at a concert, but was prevented by dangerous illness, and it was decided, on the above principle, that no action would lie against her for breach of contract (*h*).

In *Taylor* v. *Caldwell* (*f*), which is the leading case on the subject, an agreement to let a music-hall for four days was held to be terminated when the hall was burned down. Many cases arising out of the postponement of the coronation of his late Majesty King Edward the Seventh have further defined and illustrated the doctrine of *Taylor* v. *Caldwell*. All these cases show that a contract may be based on the assumption that a certain event will happen, and if the event does not happen, the contract will come to an end, although the direct subject-matter of it—*e.g.*, a ship or a room—may continue in existence. But the doctrine has no application unless the happening of the event is assumed by both parties to be the sole basis of the contract. So, a person who hired a steamship for the purpose of seeing an intended royal naval review, was held not entitled to refuse payment because it had become impossible to use the vessel for the particular purpose contemplated by him (*i*). Neither does the doctrine apply when the parties have themselves provided for the contingency of performance becoming impossible (*k*).

(*f*) (1862), 3 B. & S. 826.

(*g*) *Nickoll* v. *Ashton*, [1901] 2 K. B. 126; 6 Com. Cas. 150.

(*h*) *Robinson* v. *Davison* (1871), L. R. 6 Ex. 269.

(*i*) *Herne Bay Steamboat Co.* v. *Hutton*, [1903] 2 K. B. 683; *cf.* *Krell* v. *Henry*, *ibid.* 740.

(*k*) *Elliott* v. *Crutchley*, [1904] 1 K. B. 565; affirmed, [1906] A. C. 7.

In cases to which the doctrine applies, the rights of the parties must be ascertained at the moment when performance or further performance becomes impossible; each party is excused from any act of further performance, but the contract is not void *ab initio*, and money paid under it cannot be recovered back (*l*). As impossibility only releases the parties from further performance, it follows that if, by the terms of the contract, any right has accrued before the time when performance became impossible, that right can be enforced (*m*).

(vi) Miscellaneous.

A contract may be put an end to—(i) by merger, by the substitution of a higher grade of contract—*e.g.*, a judgment for a simple contract debt; (ii) by bankruptcy (unless the contract is one which the trustee in bankruptcy can and does adopt), so far as the contract gives rise to a debt provable in bankruptcy; (iii) if the contract be in writing, by an unauthorised alteration in a material part made by a party seeking to enforce the contract.

False Representations.

A representation is a statement made by one party to another, before or at the time of the contract, of some matter or circumstance relating to it.

An untrue representation may fall into one of seven classes. It may be—

(a) a mere statement of opinion honestly given; or it may be a mere flourish in the nature of a

(*l*) *Blakeley* v. *Muller*, [1903] 2 K. B. 760 n.
(*m*) *Chandler* v. *Webster*, [1904] 1 K. B. 493.

puff; if this be proved, the deceived party in such case has no right of action in relation to it; or

(b) it may amount to a warranty—*i.e.*, to an agreement not being an essential term of the contract, but connected with it collaterally; the falsity may entitle the deceived party to damages, but not to rescind (*n*); or

(c) it may be a term of the contract itself, in which case its falsity will have the effect of a breach of contract (see *ante*, p. 71); or

(d) it may be a condition precedent, in which case the deceived party may sue for damages, or rescind the contract at his option (*o*); or

(e) it may, though innocently made, be a statement which the maker may not deny, for "where one by his words, or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" (*p*); or

(f) it may be a statement innocently made not falling in any of the above categories, but which is material, and which induced a party to enter into the contract; it may then be classed as an "innocent misrepresentation"; or

(g) it may be a fraudulent misrepresentation.

(*n*) But breach of warranty in connection with a policy of marine insurance entitles the injured party to rescind.

(*o*) But see an exception to this, *post*, p. 96.

(*p*) Lord Denman, in *Pickard* v. *Sears* (1837), 6 A. & E., at p. 474.

It is proposed to refer in more detail to misrepresentations classed under (f) and (g).

(i) Fraudulent Misrepresentation.

No precise definition is given in the English law books; it has been said to include every kind of artifice by which one person deceives another. The elements of which it must necessarily consist are the following (*q*):

1. *A False Representation of a Material Fact.*—A mere expression of opinion therefore will be no fraud, nor usually will a declaration of intention; thus, if a vendor says, "I think that horse worth £10." though the statement is knowingly false, no action will lie. If, however, he says, "I gave £10 for it," this, if untrue, would be such a representation as to be the foundation of a fraud. A statement of intention is usually not a statement of fact (*r*), but it may be (*s*); "the state of a man's mind is as much a fact as the state of his digestion," said Bowen, L.J. (*s*). It has been questioned whether mere non-disclosure can amount to fraud. "Mere omission, even though such as would give reason for setting aside a contract, is not, in my opinion, if it does not make the substantive statements false, a sufficient ground for maintaining an action for deceit" (*t*), and "there must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the

(*q*) *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 481, 482.
(*r*) *Maddison* v. *Alderson* (1883), 8 App. Cas. 467.
(*s*) *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D., at p. 483.
(*t*) Cotton, L.J., in *Arkwright* v. *Newbold* (1881), 17 Ch. D. 320.

withholding of that which is not stated makes that which is stated absolutely false" (*u*). The rule then seems to be, that if the fragmentary statement made is rendered untrue by that which is not stated, the representation is fraudulent; otherwise, it is not.

2. *A Representation Known to be False, or made without Belief in its Truth, or Recklessly, without Caring whether it be True or False.*—At one time, some judges considered that false statements carelessly made without reasonable ground of belief in their truth, apart from actual dishonesty, constituted a species of "legal fraud" (*x*). This doctrine must be treated as now exploded by the important case of *Derry* v. *Peek* (*y*). There a company issued a prospectus, stating that the company had a right to use steam power for its tramway cars; as a fact, the consent of the Board of Trade was required before steam could be used, and when, afterwards, consent was applied for, it was refused. The directors believed the truth of their statements, and pleaded that they had reasonable ground for believing them to be true; Mr. Justice Stirling gave judgment in their favour; he was reversed on appeal (*z*), Lopes, L.J., summing up his view of this law thus: "If a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely upon it and is thereby

(*u*) Lord Cairns, in *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 403; and see *per* Jessel, M.R., in *Smith* v. *Chadwick* (1882), 20 Ch. D. 58.

(*x*) *Reese River Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 79; Lord Cairns, in *Peek* v. *Gurney* (1873), L. R. 6 H. L. 409; Lord Chelmsford to the same effect in *Western Bank of Scotland* v. *Addie* (1867), L. R. 1 H. L. (Sc.) 145, 161.

(*y*) (1889), 14 App. Cas. 337.

(*z*) (1888), 37 Ch. D. 541.

damaged, then the person making the statement is liable to make compensation to the person to whom it is made—*First*, if it is false to the knowledge of the person making it ; *secondly*, if it is untrue in fact and not believed to be true by the person making it ; *thirdly*, if it is untrue in fact and is made recklessly—*e.g.*, without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false : *fourthly*, if it is untrue in fact but believed to be true, but without any reasonable grounds for such belief." The case was taken to the House of Lords (*y*), when the law was definitely settled ; and we may now say that the three first propositions of Lopes, L.J., are correct, but that the fourth is not good law ; in other words, in an action of deceit the plaintiff must prove actual fraud, not mere negligence ; and the defendant will be successful if he proves that he honestly believed in the truth of the statement he made, though he acted on no reasonable ground in so doing.

If the representation in fact be fraudulent within the definition above given, honesty of motive in making it will not be an answer to an action of deceit (*a*).

3. *A Representation Intended by the Maker to be Acted upon by the Party Misled by it.*—" A mere naked falsehood is not enough to give a right of action, but if it be a falsehood told with an intention that it should be acted upon by the party injured" [it is sufficient] (*b*). In the case of *Langridge* v. *Levy* (*c*), defendant sold a

(*a*) *Polhill* v. *Walter* (1835), 3 B. & Ad. 114 ; *Foster* v. *Charles*, 7 Bing. 105.

(*b*) Parke, B., in *Langridge* v. *Levy* (1838), 2 M. & W. 519, 531.

(*c*) (1838), 2 M. & W. 519 ; 4 M. & W. 337.

gun for the use of a customer and his sons, one of these being the plaintiff. The gun burst and injured the plaintiff, and this action was brought to recover damages for fraud in describing the gun. It was held that the plaintiff could recover, for the jury having found fraud, and the gun being to the defendant's knowledge for the use of the plaintiff as well as for that of the actual customer, the fraudulent representation was intended to be acted upon by the plaintiff.

A converse case is that of *Peek* v. *Gurney* (*d*), where fraudulent statements being made in a prospectus, an action was brought by some shareholders who were not original allottees. It was decided that no action would lie, as the prospectus was intended to be acted upon by original applicants for shares only. But when it is proved that the prospectus is issued, not merely to induce applications for allotments of shares, but also to induce persons to buy on the market, those who buy on the faith of the prospectus are entitled to their remedy for false statements in the prospectus which actually deceived them (*e*).

The law is, therefore, as stated by Wood, V.-C., in *Barry* v. *Croskey* (*f*): "Every man must be held responsible for the consequence of a false representation made by him to another, upon which a third person acts . . . provided it appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss. The injury

(*d*) (1873), L. R. 6 H. L. 377.
(*e*) *Andrews* v. *Mockford*, [1896] 1 Q. B. 372.
(*f*) (1861), 2 J. & H. 1.

must be the immediate, and not the remote consequence of the representation made " (*g*).

4. *The Representation must Actually Deceive.*—If the promisor is not deceived by, or did not rely on the representation, the contract cannot be undone on the ground of fraud (*h*). Thus, a purchaser did not examine his purchase; it contained a flaw, which rendered it worthless, and this flaw was actively concealed. It was decided that an inspection not being made, and the concealment not having affected the mind of the purchaser, he could not maintain an action for deceit (*i*).

It has been attempted upon this ground to set up a defence to an action for fraud, where the plaintiff actually examined the facts, or had an opportunity of so doing. In such a case, if he relied on the representations, the fact that he also looked into the matter will not necessarily affect the case; but if he did not rely on them, of course there is no remedy on the ground of fraud (*k*). In *Redgrave* v. *Hurd* (*l*), Jessel, M.R., said that, if the representation was material, it was an inference of law that it induced him to enter into the contract, but with this Lord Blackburn does not agree; he thinks the question to be one of fact (*m*). It

(*g*) This statement has received the approbation of Lord Cairns in *Peek* v. *Gurney* (1873), L. R. 6 H. L., at p. 413, and of the Court of Appeal in *Andrews* v. *Mockford*, *supra*.

(*h*) *Smith* v. *Chadwick* (1882), 20 Ch. D. 27; 9 App. Cas. 187.

(*i*) *Horsfall* v. *Thomas* (1862), 1 H. & C. 90.

(*k*) *Smith* v. *Land and House Property Corporation* (1885), 28 Ch. D. 7.

(*l*) (1882), 20 Ch. D. 1.

(*m*) *Smith* v. *Chadwick* (1884), 9 App. Cas., at p. 196.

is certain, that if statements are made, there is no duty cast on the other party to look into the truth of them. "The representation once made relieves the party from an investigation, even if the opportunity is afforded" (*n*). But perhaps there may be cases in which circumstances of suspicion may put the party upon inquiry, and make it his duty to inquire (*n*).

5. *Damage must have been Suffered.*—Without this the fraud may exist, but no action for damages can be brought in connection with it; "fraud without damage or damage without fraud" does not give rise to an action of deceit (*o*).

Remedies.—A defrauded person has several remedies open to him. He may (i) rescind the contract (with or without claiming damages (*p*)), resist any action to enforce it, and obtain a declaration that it is void; (ii) he may affirm it, and bring an action for damages for the fraudulent representation.

A party who elects to rescind, must do so within a reasonable time (*q*). "If in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to

(*n*) Baggallay, L.J., in *Redgrave* v. *Hurd* (1882), 20 Ch. D. 23; and see *Dobell* v. *Stevens* (1824), 3 B. & C. 623.

(*o*) Halsbury, L.C., in *Derry* v. *Peek* (1889), 14 App. Cas., at p. 343.

(*p*) Bowen, L.J., in *Newbigging* v. *Adam* (1887), 34 Ch. D., at p. 592.

(*q*) *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325; *Central Venezuela Rail. Co.* v. *Kisch*, *ibid.* 99.

rescind" (*r*). Lapse of time will always be construed favourably to affirmation (*s*). The contract remains valid until it is actually rescinded (*t*).

It remains to add that no action will lie on a representation, though false and fraudulent, as to the character, conduct, credit, ability, trade. or dealings of any person, made to the intent or purpose of enabling such person to get credit, money, or goods, unless the representation be made in writing signed by the party to be charged therewith (*u*). The signature of an agent is not sufficient to charge his principal ; and the protection extends to incorporated companies (*x*).

(ii) Innocent Misrepresentation.

At common law (except in contracts requiring the utmost good faith), in order to obtain rescission of a contract on the ground of misrepresentation, wilful falsehood must have been shown. In equity it would (it seems) have been sufficient to show that the statement was material and false, though not necessarily to the knowledge of the maker (*y*), and relied on by the injured party. At one time there might have been a

(*r*) *Clough* v. *London and North Western Rail. Co.* (1872), L. R. 7 Ex. 35, quoted with approval by Lord Watson in *Aaron's Reefs* v. *Twiss*, [1896] A. C., at p. 290. In consequence of this rule a shareholder cannot get rescission on the ground of fraud, unless he starts proceedings before a winding up (*Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325 ; *Reese River Silver Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64).

(*s*) See *per* Lord Davey, in *Aaron's Reefs* v. *Twiss*, [1896] A. C., at p. 294.

(*t*) *Reese River Silver Mining Co.* v. *Smith*, *supra*.

(*u*) 9 Geo. 4, c. 14, s. 6.

(*x*) *Hirst* v. *West Riding Union Banking Co., Limited*, [1901] 2 K. B. 560.

(*y*) Jessel, M.R., in *Redgrave* v. *Hurd* (1882), 20 Ch. D. 12.

doubt as to this, but the dicta in *Redgrave* v. *Hurd* have been accepted as law, quoted with approval (*z*), and are now regarded as accurately stating the law. And since the Judicature Act, 1873 (36 & 37 Vict. c. 66), the equitable rule prevails; innocent misrepresentation, therefore, of a material fact, will entitle the injured party to rescission, though not to damages, if he make his application in good time (*a*). But an executed contract for a lease (*aa*) or for the sale of a chattel or chose in action cannot be rescinded on the ground of an innocent misrepresentation (*b*).

The party who takes advantage of his right to rescind a contract on the ground of innocent misrepresentation cannot recover damages, but he may insist on being restored to the position he occupied before he entered into the contract. In *Adam* v. *Newbigging* (*c*), the respondent, who was induced by innocent misrepresentation to become a partner in an insolvent business with the appellants, was held entitled on rescission to repayment of his capital, though the business, his share of which he restored to the appellants, had then entirely failed with large liabilities. This case seems almost inconsistent with the rule that rescission will not be granted unless complete restitution can be made; if the decision is not based upon the fact that an "insolvent business" is the same thing as a "more insolvent business," the rule must be taken not to apply to

(*z*) See *per* Bowen, L.J., in *Newbigging* v. *Adam* (1887), 34 Ch. D., at p. 593.

(*a*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas., at p. 1279.

(*aa*) *Angel* v. *Jay* (1911), 1 K. B. 666.

(*b*) *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326; *cf.* *Scott* v. *Coulson*, [1903] 2 Ch. 249, *post*, p. 103.

(*c*) (1888), 13 App. Cas. 308.

deterioration which is the result of inherent weakness in the subject-matter of the contract. On the other hand, in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (*d*), rescission was refused where a change of position had resulted from the plaintiffs having worked certain nitrate deposits which they had purchased from the defendants.

As a rule, it is not the duty of parties to a contract to disclose everything which may affect the judgment of the opposite party in deciding whether or not to enter into the contract, provided that this silence does not cause the statements made to be actually false (*e*). But there is a certain group of contracts which are voidable by a party misled who enters into them unless each party has disclosed to the other every material fact within his own knowledge, or that of his agent, at the time when the contract is made (*f*). These are styled contracts *uberrimæ fidei*. They include all contracts of insurance (*g*), and are not limited to contracts of marine, fire and life (*h*), insurance ; contracts for the sale of land in some respects (*i*), suretyship [where there is misrepresentation or improper concealment as to the relations between the creditor and the principal debtor (*k*)], contracts to take shares in companies (*l*), and partnership.

(*d*) [1899] 2 Ch. 392.

(*e*) See *ante*, p. 91.

(*f*) *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531.

(*g*) *Seaton* v. *Heath*, [1899] 1 Q. B. 782 ; 4 Com. Cas. 193 ; reversed on the facts, *sub nom. Seaton* v. *Burnand*, [1900] A. C. 135 ; 5 Com. Cas. 198.

(*h*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363.

(*i*) *Flight* v. *Booth* (1834), 1 Bing. N. C. 370.

(*k*) *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666.

(*l*) *Central Venezuela Rail. Co.* v. *Kisch* (1867), L. R. 2 H. L., at p. 113.

There are a few exceptions to the rule that an innocent misrepresentation will not give rise to an action for damages; for instance, an agent who induces another to deal with him, innocently stating that he has an authority which he does not possess, may be liable in damages to those who act on and are injured by the misrepresentation (*m*).

But a more important exception was introduced, in consequence of the decision in *Derry* v. *Peek* (*n*), by the Directors' Liability Act, 1890, the provisions of which were re-enacted by s. 84 of the Companies (Consolidation) Act, 1908 (*o*). The Act applies only to statements made in a prospectus inviting persons to *subscribe* for shares in or debentures of a company, and entitles persons so subscribing on the faith of untrue statements to proceed for damages against any of the following: (i) directors at the time of issuing the prospectus; (ii) persons who have authorised their names to be placed on a prospectus as being directors or as having agreed (at once or after an interval) to become directors; (iii) promoters—*i.e.*, persons being parties to the preparation of the prospectus, and not being engaged in such preparation merely in a professional capacity; (iv) any person who authorised the issue of the prospectus. Liability may be avoided if the party attacked shows that he had reasonable ground to believe in the truth of the statements contained in the prospectus; or that he withdrew his consent to be a director before the issue of the prospectus, or that the

(*m*) See *per* Lindley, L.J., in *Firbank's Executors* v. *Humphreys* (1887), 18 Q. B. D., at p. 62; and *post*, pp. 137, 138.

(*n*) See *ante*, p. 92.

(*o*) 8 Edw. 7, c. 69.

prospectus was issued without his knowledge or consent: or that the prospectus being issued without his knowledge or consent, he at once, on becoming aware of the issue, gave reasonable public notice that it was so issued; or that after the issue of the prospectus and before allotment under it he became aware of any untrue statement therein and gave reasonable public notice of the withdrawal of his consent thereto and of his reason for so doing. Moreover, the directors and other persons referred to above, may successfully defend themselves if they can show that the false statement is a correct and fair copy of or extract from a public official document, or is a fair representation of the statements or report of an expert; though if any person had not reasonable grounds for believing in the competency of the expert who makes the statement or report, this last ground of defence is not available to him.

MISTAKE.

The rule of law has been thus stated: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms" (*p*).

But it may happen that what is apparently a contract is, owing to mistake, no contract at all; consequently

(*p*) *Smith* v. *Hughes* (1871), L. R. 6 Q. B., *per* BLACKBURN, J., at p. 607.

no rights or liabilities arise from the transaction—*e.g.*, when the thing bargained for does not exist (*q*); in the case of error as to the person with whom the contract is made, whenever his identity can be regarded as important (*r*); where there is a mistake as to the identity of the subject-matter; for in all these cases the two parties have never been *ad idem*. Thus, where A. agreed to buy of B. a cargo of cotton, to arrive "ex *Peerless* from Bombay," and there were two ships which answered this description, the one being intended by A., and the other by B., it seems there was no contract (*s*). In this case the contract as expressed contained a latent ambiguity. It applied equally well to two subject-matters, and if each party, doing nothing to mislead the other, understood it differently, there seems no ground upon which the interpretation of one should be preferred to that of the other. If, however, they had both meant the same vessel, but had called it by an erroneous name, the contract would have been good.

If two persons enter into a contract and understand the contract in a different sense, it will be binding, unless the party who desires to support the contract has, however innocently, by his conduct induced the mistaken belief of the other party as to the real meaning of the contract made. Thus, in *Smith* v. *Hughes* (*t*), X. bought oats from Y., the oats were new, X. thought he was buying old oats; it was decided

(*q*) *Strickland* v. *Turner* (1872), 7 Ex. 208.

(*r*) *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223; *cf. Gordon* v. *Street*, [1899] 2 Q. B. 641, where a notorious money-lender fraudulently concealed his identity, and the contract was avoided.

(*s*) *Raffles* v. *Wichelhaus* (1864), 33 L. J. Ex. 160; 2 H. & C. 906.

(*t*) (1871), L. R. 6 Q. B. 597. See also *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

that this alone would not exonerate him from performing the contract, the seller having done nothing to induce the mistake on the part of the buyer.

If a mutual mistake on a material matter is established to the satisfaction of the court, the contract may be set aside, although completed by assignment (*u*).

The above rules are applicable when the mistake is one of fact; if there is a mistake of law, the rule is *Ignorantia juris neminem excusat* (*x*). Thus in *Kitchin* v. *Hawkins* (*y*), the defendant called a meeting and proposed a composition, which was accepted by nearly all the creditors. The plaintiffs did not consent, but acting under the impression that they were bound by the deed accepted by the required number of creditors, they took their share of the composition. As a fact the deed was void, but the court decided that the plaintiffs were nevertheless bound by their agreement to take less, for their mistake "was no mistake of fact, but only a mistake upon a nice point of law."

In equity, and since the Judicature Act, 1873, equity prevails, the rule is somewhat less strict. JAMES, L.J., in *Ex parte James* (*z*), said that the principle must not be pressed too far; and the Judicial Committee have, in their judgment in *Daniell* v. *Sinclair* (*a*), expressed themselves to the same effect. "In equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn" [as at common law].

(*u*) *Scott* v. *Coulson*, [1903] 2 Ch. 249.
(*x*) *Bilbie* v. *Lumley* (1802), 2 East, 469, 471.
(*y*) (1867), L. R. 2 C. P. 22.
(*z*) (1874), L. R. 9 Ch. App. 609, 614.
(*a*) (1881), 6 App. Cas. 181, 190.

A distinction has been taken between mistake caused by ignorance of a general rule of law, and that caused by ignorance of a particular right ; the contract in the latter case being liable to avoidance. "When the word *jus* is used in the sense of denoting a private right, that maxim (*b*) has no application. Private right of ownership is a matter of fact ; it may be the result also of matter of law ; but if the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Now that is the case with these parties, the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand" (*c*).

Remedies in Cases of Mistake.—At common law the remedy is rescission when the contract is still executory and the *status quo* can be restored ; and money paid by mistake of fact may be recovered. In equity there is a right of rescission, or in some cases, of rectification. Where the mistake is not mutual, the remedy is rescission, but the court may offer the other party what the party making the mistake intended to give, and upon the offer being accepted, order rectification instead of rescission. If the mistake is mutual, the court may amend the contract, rectifying it in accordance with the intended terms (*d*).

(*b*) *Ignorantia juris haud excusat.*

(*c*) Lord Westbury, in *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, 170 ; and see *Earl Beauchamp* v. *Winn* (1873), L. R. 6 H. L. 223.

(*d*) *Paget* v. *Marshall* (1885), 28 Ch. D. 255.

Undue Influence and Duress.

Undue influence is the improper use of any power possessed over the mind of a contracting party, and it may in all cases be proved as a fact (*e*). Moreover, according to the doctrine expounded in *Huguenin* v. *Baseley* (*f*), undue influence is presumed (in the absence of rebutting evidence) in all cases where the relative position of the parties is such as to render it probable that such influence exists and has been exerted ; *e.g.*, between solicitor and client, trustee and *cestui que trust*, guardian and ward, etc. But the relation of husband and wife is not one of those to which the doctrine applies (*g*). Duress is actual or threatened violence, or imprisonment. In cases of undue influence and duress the law considers that consent is not freely given, and it allows the contract to be avoided at the will of the party coerced ; the contract can subsequently be made good if ratified when that party is absolutely free from the influence or power. Whether the coercion amounts to duress depends upon the facts of each particular case : " whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger " (*h*).

(*e*) *Smith* v. *Kay* (1859), 7 H. L. Cas., at pp. 778, 779.
(*f*) (1807), 14 Ves. 273.
(*g*) *Howes* v. *Bishop*, [1909] 2 K. B. 390.
(*h*) Butt, J., in *Scott* v. *Sebright* (1887), 12 P. D., at p. 24.

Foreign Law.

Conflict of Laws.—A dispute sometimes arises as to what is to be the law by which a contract or some part of it is to be governed or applied. The uncertainty may be brought about by a variety of causes : for instance, the contract may be entered into in one country with a view to its being wholly or partly performed in another, and the laws of the two countries may materially differ as to the validity or effect of one or more stipulations in the contract. It is impossible either to exhaust the circumstances which may give rise to the dispute or to lay down hard and fast rules for the determination of any particular case, but all the authorities agree that the point to be ascertained is—what was or must be presumed to have been the intention of the parties with respect to the country the law of which is to govern the contract ? Any presumptions or primâ facie rules which have from time to time been evolved by text writers or laid down in decided cases are solely directed to the ascertainment of this intention. It must always be a matter of construction of the contract itself as read by the light of the subject-matter and the surrounding circumstances. The most satisfactory evidence of the intention of the parties is, of course, the language of the contract, and it is only where this leaves the question in doubt that there is any occasion to resort to other considerations : thus, where a contract was entered into in England between parties residing in England and Scotland respectively, but was mainly to be performed in Scotland, the House of Lords largely based their judgment upon the following clause in the contract : "Should any dispute arise out

of this contract the same to be settled by two members of the London Corn Exchange or their umpire in the usual way." This was considered to be a clear indication that the parties contemplated that the contract should be interpreted according to the rules of English law (*i*).

Where the doubt is not removed by the language of the contract, the broad rule is that the law of the country where the contract is made presumably governs the nature, the obligation, and interpretation of it, unless the contrary appears to be the intention of the parties (*k*). The very manner in which this rule is stated shows that it is one which may have to give way to other considerations of more weight. The place of performance is a very material fact. "In most cases, no doubt, where a contract is to be wholly performed abroad the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law ; but this primâ facie view is in its turn capable of being rebutted by the express or implied intention of the parties as deduced from other circumstances" (*l*). Even where a contract between English subjects is to be wholly or partly performed abroad the parties may only have intended to incorporate the foreign law so far as the regulation of the method and manner of performance abroad was concerned, without altering any of the incidents which attach to the contract according to English law. In *Jacobs* v. *Credit Lyonnais* (*m*) a contract was

(*i*) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202.

(*k*) *Jacobs* v. *Credit Lyonnais* (1884), 12 Q. B. D. 589 ; *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321.

(*l*) *Per* Bowen, L.J., in *Jacobs* v. *Credit Lyonnais*, *supra*, at p. 601.

(*m*) (1884), 12 Q. B. D. 589.

made in England between English resident houses for the sale of a large quantity of goods to be shipped by a French company at a port in Algeria. Owing to an insurrection in Algeria the export of this particular merchandise was forbidden by the authorities there, at a time when the contract had not been wholly completed, thereby rendering further performance impossible. According to the law of Algeria this would have excused further performance. It was, however, decided that the contract was an English contract, and the obligation to deliver being absolute the subsequent impossibility afforded no defence to an action for damages.

Other material considerations, besides the place where the contract was made and the place of performance, may have to be taken into account, such as the residence of the contracting parties, the form of the contract, its subject-matter, the things to be done, and the occurrence of a stipulation which is valid according to the law of one country but unenforceable in another. Presumably the parties would have intended the whole of their contract to be enforceable, and the existence of such a stipulation as that last mentioned would be cogent evidence that the parties were looking to the tribunal which would enforce it (*n*). Like the other presumptions, it is not conclusive. Other things being equal, preference should be given to the law of the place with which the transaction has the most real connection (*o*).

(*n*) *In re Missouri Steamship Co.*, *supra;* and *cf. South African Breweries, Limited* v. *King*, [1899] 2 Ch. 173.

(*o*) *South African Breweries, Limited* v. *King*, *supra;* Westlake's Private International Law, at p. 258.

And where the residence of any party is material, actual and not nominal residence is to be considered (*o*). This is especially important in the case of companies registered in one country and carrying on business in another.

If the English courts decide that a contract is to be governed by the law of a foreign country, and the contract contains a stipulation valid by the law of that country, but unenforceable by English law, the exact nature of the stipulation has a further importance. If it contravenes some essential principle of justice or morality, as recognised by the courts of this country, it will not be enforced (*p*), and if, though not immoral or unjust, it is in direct conflict with deeply-rooted and important considerations of local policy, the recognition of it will be equally denied. Otherwise, effect will in most cases be given to the stipulation, even though it would be unenforceable if contained in an English contract (*q*).

On the other hand, the English courts will not recognise a disability or disqualification arising from the principles or custom or positive law of a foreign country, especially if it is of a penal nature, provided that it is not known here. Thus, a person adjudged by a French court to be a prodigal may be prohibited from dealing with his property without the assistance of an adviser appointed by that court. Such a prohibition would not, however, prevent him from obtaining or

(*p*) *Kaufman* v. *Gerson*, [1904] 1 K. B. 591.

(*q*) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202; *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321.

dealing with property belonging to him in England (*r*).

In like manner the English courts will not recognise the law of a foreign country imposing a personal liability on the shareholders of an English limited company, which incurs debts in trading abroad; because such a liability in respect of the company's debts is inconsistent with the limitation of the shareholder's liability according to English law, and that limitation is the legal basis of his relation to the company (*s*).

Whatever law governs the interpretation of the contract, anything which relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. The practice of those courts must be followed, their rules as to the admissibility of evidence will apply, and so will any provision which bars the remedy, such as the Statute of Limitations (*t*). If the remedy is barred by lapse of time according to the law of the country in which enforcement is sought, it does not matter that it is not so barred by the law of the country with respect to which the contract was made (*t*). Conversely, an action on a foreign contract may be maintained here, even though the time has expired for enforcing the contract in the foreign country, provided that the period laid down by the English Statutes of Limitations has not

(*r*) *Worms* v. *De Valdor* (1880), 49 L. J. Ch. 261; *In re Selot's Trusts*, [1892] 1 Ch. 488.

(*s*) *Risdon Iron and Locomotive Works* v. *Furness*, [1906] 1 K. B. 49. Except, perhaps, in a case where a shareholder has expressly authorised the directors to pledge his personal credit (*ib.*).

(*t*) *Don* v. *Lippmann* (1838), 5 C. & F. 1.

been exceeded (*u*). It would be otherwise if the foreign statute destroyed the debt as well as the remedy (*u*).

Foreign law will not be judicially noticed in the English courts. It must be proved, as a matter of fact, by the evidence of a competent witness (*x*).

Foreign Judgment.—The judgment of a foreign court having jurisdiction over the subject-matter, and the parties brought before it, will be acted on here as final, and may be enforced by action, provided that the proceedings are not in conflict with English views of natural justice, even though there may have been some irregularity in them (*y*), unless the judgment has been obtained by fraud (*z*) or an English statute applies to the circumstances (*a*). The fraud of the plaintiff in obtaining the judgment may be pleaded as a defence to an action brought on the foreign judgment, even though it cannot be proved without re-trying the question adjudicated upon by the foreign court (*z*). But it would be no defence to an action on such a judgment that the foreign court had, according to English law, put an erroneous construction on an English contract (*b*). The foreign court must have had jurisdiction.

In actions *in personam* there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the

(*u*) *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653.
(*x*) *Vander Donkt* v. *Thelluson* (1849), 8 C. B. 812.
(*y*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.
(*z*) *Vadala* v. *Lawes* (1890), 25 Q. B. D. 310.
(*a*) *Hay* v. *Northcote*, [1900] 2 Ch. 262.
(*b*) *Godard* v. *Gray* (1871), L. R. 6 Q. B. 139.

foreign country in which the judgment has been obtained ; (2) where he was resident in the foreign country when the action began ; (3) where the plaintiff in the character of plaintiff has selected the forum in which he is afterwards sued ; (4) where he has voluntarily appeared ; and (5) where he has contracted to submit himself to the forum in which judgment was obtained (*c*). But the ownership of property abroad is not sufficient to give the foreign court jurisdiction in a personal action (*d*).

(*c*) *Emanuel* v. *Symon*, [1908] 1 K. B. 302, at 309 ; *per* Buckley, L.J. See also *Schibsby* v. *Westenholz* (1871), L. R. 6 Q. B. 155.

(*d*) *Emanuel* v. *Symon*, *supra*.

PART II.

RULES RELATING TO PARTIES TO CONTRACTS.

AGENCY.

An agent, or, as he is styled in the old books, an attorney, is "he who is employed to do anything in the place of another" (*a*), and the person who employs is called the principal. It must be noted, however, that agency is not mere employment, but employment for the purpose of putting the principal into legal relations with others. In treating of the law of agency, these others will be styled third parties.

Agents may be divided into various classes. Some of the most important, together with the chief variations in their legal characteristics, will be found enumerated hereafter (*b*). Taking them generally, they have been divided by writers (*c*) into three classes: (1) *Special*, viz., those who have authority to do a specific act, *e.g.*, buy a particular thing; (2) *General*, viz., those who may do anything coming within certain limits, *e.g.*, agent to manage a business; (3) *Universal*, viz., those who may do anything on behalf of their principal, and whose authority is unlimited. Thus, a universal agent

(*a*) Comyns' Digest, Attorney A.
(*b*) *Post*, pp. 150 *et seq.* (*c*) See Story, Agency, ss. 17, 21.

may do anything on behalf of and bind his principal, if only it is legal and otherwise consonant to the general law of contracts; a general agent may do the same within prescribed limits; a special agent is tied down to the specific act to perform which he is appointed. A man may have two businesses, *e.g.*, banker and tea merchant; his general agent in the banking-house would have no authority to contract on his behalf in the tea-house, and *vice versâ*; his universal agent could do so in both; a messenger who is sent to get postage stamps could bind him only in matters incidental to that purchase.

WHO MAY APPOINT AND BE APPOINTED AGENTS.

Those who cannot make contracts themselves (as to whom see *ante*, pp. 31 *et seq.*) cannot get rid of their disabilities by the employment of agents, but it is settled that incapacity to contract for himself will not prevent a person from being appointed agent to contract for another. For instance, at common law a married woman is incapable of contracting for herself, but she could, with the proper authority, bind her husband by contracts made on his behalf (*d*).

APPOINTMENT OF AGENTS.

As a rule, no formal mode of appointment is required; in fact, the vast majority of agencies are created verbally, often without any express arrangement at all, and unless these were recognised by law, mercantile business could

(*d*) *E.g.*, *Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559.

hardly proceed. But if the agent is to have authority to contract under seal, the authority must also be under seal, and it is then called a power of attorney, though the want of a deed will be of no avail as a defence to a principal who is present and allows the agent to enter into the contract for him (*e*). Also, a deed is necessary when the intended principal is a corporation, and the authority given is to enter into contracts which a corporation can only make under seal (*f*). In other cases writing seems to be unnecessary for the due appointment of an agent unless expressly required by statute. Writing is required (and possibly a deed (*g*)) for the appointment of an agent where the contract is within the provisions of ss. 1 and 3 of the Statute of Frauds, which relate to leases. Contracts within s. 4 of the Statute of Frauds and of the Sale of Goods Act, though unenforceable by action unless in writing, may be validly made by verbally authorised agents (*h*).

The following may be the methods of appointment: 1. Seal. 2. Parol (including words and writing). 3. Implication arising from the conduct or situation of the parties. Under this last head come such cases as the following: A servant allowed to purchase oats for his master's horses; the authority of a partner or wife to bind a copartner or husband; an owner who sends horses to a repository for the sale of horses

(*e*) *Ball* v. *Dunsterville* (1791), 4 T. R. 313.

(*f*) See *ante*, pp. 45—47.

(*g*) See 8 & 9 Vict. c. 106, s. 3.

(*h*) *Higgins* v. *Senior* (1841), 8 M. & W. 844; *Heard* v. *Pilley* (1869), L. R. 4 Ch. 548. *Cf.* the Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 80 (2), which provides that an agent to sign the copy of any prospectus filed in accordance with the requirements of the Act, must be authorised in writing.

authorises a bonâ fide sale, and generally a person may so act as to be precluded from denying authority. So in *Pickering* v. *Busk* (*i*) a broker was employed by a merchant to buy hemp; the broker did so, and, at the merchant's request, the hemp was left at the broker's wharf; the broker sold the goods, and the sale was supported on the ground that the broker was the apparent agent, and that the merchant was estopped by his conduct from denying the agency. Such agencies have been styled agencies by estoppel.

Ratification.—Although an agency may be non-existent at the time when the contract is entered into, it may arise and be made retrospective by *ratification*, *i.e.*, adoption of the contract as made. But there can be no ratification unless in making the contract the agent purported to act for or acted in the name of a principal, and a contract made by a person in his own name with an *undeclared* intention that it should be made on behalf of another, for whom he then had no authority to act, cannot be ratified (*k*). The principal must be in existence when the contract is made, and when ratifying, either have full knowledge of the facts or be shown to have adopted the acts, whatever they were (*l*). For these reasons a company cannot adopt or ratify a contract entered into on its behalf before the company was incorporated (*m*); it may make a new contract to the same effect, unless such contract would

(*i*) (1812), 15 East, 38.

(*k*) *Keighley Maxted & Co.* v. *Durant*, [1901] A. C. 240.

(*l*) *Marsh* v. *Joseph*, [1897] 1 Ch. 213.

(*m*) *Kelner* v. *Baxter* (1867), L. R. 2 C. P. 174; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16.

be *ultra vires* (*n*); on the other hand, it may confirm an allotment of shares made, after its incorporation, by an irregularly attended meeting of directors (*o*). If the contract is properly ratified, the ratification is thrown back to the time when the act was done, so that it can be effectively made after repudiation by the promisor (*p*). Moreover, the ratification must be not of part of the contract but of the whole (*q*).

It may be added that where an agent makes a contract in the name of his principal, but with the intention of fraudulently taking the benefit of the contract for himself, the principal may nevertheless ratify and enforce the contract as against the other parties to it (*r*). On the other hand, if an agent contracts in the name of a principal and the contract is within the terms of a written authority given to the agent by the principal, then although the agent makes such contract solely in his own interests and the written authority is not disclosed to the contractee, the latter, acting in good faith, will be entitled to hold the principal bound (*s*).

Termination of Agency.

This may occur either by the act of the parties themselves or by operation of law.

(i) *By Act of the Parties.*—This is styled *revocation* if the principal withdraws, *renunciation* if the agent

(*n*) *Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653.
(*o*) *Re Portuguese Consolidated Copper Mines* (1890). 45 Ch. D. 16.
(*p*) *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295.
(*q*) *Cf. Fergusson* v. *Carrington* (1829), 9 B. & C. 59.
(*r*) *Re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66.
(*s*) *Hambro* v. *Burnand*, [1904] 2 K. B. 10.

throws up the contract. It is brought about by either party, and unless repugnant to the original terms of the contract, it may take place at any time. But it must be noted that the principal will be liable on contracts entered into on his behalf after the termination of the agency, unless he has caused notice of such termination to reach third parties, who may act on the faith of the previous authority, until such a time has elapsed, or such circumstances have happened, as would lead a reasonable man to infer that the agent's authority had been countermanded. Thus, a servant who had authority to receive, borrow, and pay money for his master, borrowed 200 guineas in his master's name after he had quitted the service; and the lender recovered against the master on the ground that he had not been made aware of the revocation of authority (*t*). So, in the case of a partnership (which is in many respects a kind of agency), the partner who leaves the firm but remains ostensibly a member, is liable for debts incurred after his retirement.

A limit to this power of revocation at any time, is found where an "*interest* has been coupled with the authority"; *e.g.*, when the principal has entered into an agreement to give something to a person, and has appointed the latter as agent to collect and secure it for himself. In such a case the authority cannot be revoked. So, although the authority of a factor to sell goods is in general revocable, it will become irrevocable if he has made advances to the principal in consideration of the latter giving him authority to sell

(*t*) *Monk* v. *Clayton*, Molloy, De Jure Maritimo, bk. 2, c. 10, s. 27.

at the market price and retain his advances out of the proceeds (*u*).

(ii) *By Operation of Law.*—(1) Subject to exceptions depending upon the special terms of the appointment, the death of the principal at once puts an end to the authority of his agent. A case illustrating this is *Smout* v. *Ilbery* (*x*), in which it was decided that a butcher was unable to recover from the husband's estate the price of meat supplied to a woman, at a time when her husband, supposed to be alive, was in reality dead; her authority to buy was gone. (2) Bankruptcy: The agent's authority is generally revoked by the bankruptcy of his principal; not necessarily by that of himself. (3) Insanity: The insanity of the agent will determine his authority, and the insanity of the principal seems equivalent to a revocation, but if third parties have dealt with the agent on the faith of the authority previously given, and without notice of its determination or revocation, the principal will be precluded from denying the continuance of the authority. Thus, in *Drew* v. *Nunn* (*y*), a man gave his wife authority to buy, then became a lunatic. When he had recovered, he repudiated her contracts, but was held liable in an action for the price.

In addition to the above, the agency may be terminated by—(i) expiration of the time agreed upon for its continuance; (ii) destruction of the subject-matter;

(*u*) *Raleigh* v. *Atkinson* (1840), 6 M. & W. 670.

(*x*) (1842), 10 M. & W. 1. In so far as this case decided that the agent would not be liable in such circumstances for damages for breach of warrants of authority, it must be treated as overruled. See *post*, p. 137.

(*y*) (1879), 4 Q. B. D. 661.

e.g., the employment of an agent to let a house is determined when the house is burnt down. The employment of an agent for a fixed term does not necessarily imply that a business shall be continued so as to give him an opportunity to earn commission, and the sale of the business before the term expires may, in effect, determine the agency without rendering the principal liable to make any compensation to the agent (*z*) ; (iii) complete performance ; *e.g.*, when an agent to procure a buyer has procured one who is accepted.

RIGHTS AND DUTIES.

(i) As Between Principal and Agent.

Duties of an Agent to his Principal.— His duty is to do the work he has undertaken, and to do it with reasonable skill and diligence. The exact amount of skill and care required varies much with the circumstances, but generally a man who undertakes to act for another must not show less diligence than he would have shown if exercising his own affairs. If in addition, he is engaged upon an understanding that he must show special skill, this skill he must show, or he is liable to indemnify his principal, even though he has done his best.

In this respect a difference is to be observed between a gratuitous and a paid agent ; the gratuitous agent is liable only in the event of negligence in carrying out a

(*z*) See *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256 ; *cf. Turner* v. *Goldsmith*, [1891] 1 Q. B. 544. It is a question of the construction of the contract in each case, an important element being the nature of the consideration moving to the promisor. See *Ogdens, Limited* v. *Nelson*, [1904] 2 K. B. 410 ; affirmed, [1905] A. C. 109.

matter actually commenced, but he is not bound to enter upon the agency at all. He is not liable for a *non*-feasance, but only for a *mis*-feasance. Whatever he does enter upon, he must carry it out without negligence, it being held that the "confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it" (*a*). Even then, however, his responsibility is not so great as that of a paid agent, for whereas the latter is liable for ordinary negligence, the voluntary agent is liable in damages only if he be guilty of gross negligence (*b*), unless, indeed, his profession is such as to imply skill, in which case, if he enter upon the work at all, he must do so with that skill (*c*). The question then arises, what is gross negligence? Crompton, J., laid down the law in *Beal* v. *South Devon Rail. Co.* (*d*), thus: "Gross negligence includes the want of that reasonable care, skill, and expedition, which may properly be expected from persons so holding themselves out (*i.e.*, as agent for anything), or their servants . . . The failure to exercise reasonable care, skill, and diligence, is gross negligence. What is reasonable varies in the case of a gratuitous bailee, and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence such

(*a*) See *Coggs* v. *Bernard* (1704), 1 Sm. L. C. (11th ed.), p. 173, and notes thereto.

(*b*) *Beauchamp* v. *Powley* (1831), 1 Moo. & R. 38; *Doorman* v. *Jenkins* (1835), 2 A. & E. 256.

(*c*) Lord Loughborough. in *Shiells* v. *Blackburne* (1789), 1 H. Bl. 158.

(*d*) (1864), 3 H. & C., at pp. 341, 342.

as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, viz., the skill usual and requisite in the business for which he receives payment" (*e*).

Whatever the agent does must be done for the benefit of his principal, not necessarily in his name; in fact, not ordinarily so. Thus, an auctioneer sells without at once disclosing the vendor; a broker sells "for my principal," or, to use a more homely example, the servant calls and engages a cabman, and all without mentioning the name of the person for whom the contract is made; but in each case all benefit belongs to the principal. An agent cannot convert himself into a principal without his principal's assent; *e.g.*, if a broker is employed to buy, he cannot sell his own goods to the principal without the principal's assent; and even a trade usage will not excuse this, unless the principal is acquainted with the usage (*f*). An agent must never place himself in such a position as to cause his duty and his interest to conflict. It is for this reason that he must not act for the advancement of his personal interests in the particular matter without leave, nor turn himself into a principal (*g*). He must not intermix his affairs with those of the principal, *e.g.*, he should not pay money received as agent into his own private account (*h*): he must always be prepared to render an account (*i*).

(*e*) "Gross negligence" has, however, been described as the same thing as negligence, with the addition of a vituperative epithet; but whether the expression is accurate or not, it serves to illustrate the fact that what amounts to negligence in one case does not necessarily constitute it in another.

(*f*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802. See *post*, p. 511.

(*g*) *Bentinck* v. *Fenn* (1887), 12 App. Cas. 652, 658, 659.

(*h*) Story, Agency, s. 208.

(*i*) *White* v. *Lincoln* (1803), 8 Ves. 363.

An agent must not make any secret profit out of his employment, and any so made will become the property of his employer. Thus in *Morison* v. *Thompson* (*k*), T., a broker, was employed to purchase a ship ; the vendor employed S. as his agent and agreed to give S. whatever was obtained over £8,500. S. agreed to give a portion of this excess to T., and eventually T. bought the vessel for £9,250. It was held that T.'s principal could claim whatever T. had obtained from S. So in *Kimber* v. *Barber* (*l*), the plaintiff desired to procure shares, and defendant agreed to buy some for him at a price ; as a fact defendant had already bought some for less and he sold these to the plaintiff, and the Lord Chancellor held that defendant was an agent and must hand over the difference between the bought and sold price. In *Harrington* v. *Victoria Dock Graving Co.* (*m*), defendants agreed to give plaintiff commission for superintending repairs to be executed on property of the Great Eastern Railway Company, plaintiff being at the time agent to the railway company. Plaintiff was to use his influence to get the defendants the work. It was decided that though the commission did not bias the plaintiff, yet the promise to give it was corrupt and the plaintiff was not allowed to recover. This case is important as showing that the effect of the illicit commission on the agent's mind is not to be considered, the mere agreement to accept it is sufficient, and if the money is paid over, it may be recovered by the principal as money received to his use.

A sub-agent who is aware that he is being employed by an agent of the principal stands in a fiduciary

(*k*) (1874), L. R. 9 Q. B. 480.
(*l*) (1873), L. R. 8 Ch. 56.
(*m*) (1878), 3 Q. B. D. 549.

relationship to the principal, and will be accountable to him for any secret commission received ; although no privity of contract has been established between the sub-agent and the principal (*n*).

But the principle prohibiting an agent from making a profit for himself beyond his agreed remuneration does not apply to the directors and officers of a corporation, which has been appointed agent, and then employs its officials to do work in connection with the agency for salaries, commission and profit costs. The directors and officers stand in a fiduciary position only to the company and not to strangers dealing with the company, and proper payments made to them by the company will be allowed (*o*).

An agent who takes a secret commission from a person with whom he is dealing on behalf of his principal is a debtor to his principal for the amount thus received ; but the principal cannot claim that the agent is trustee for him of the actual money, and so cannot follow the money into and claim the investment in which the agent has placed it ; the principal's remedy is to bring an action and get judgment for an amount equivalent to that received by the agent (*p*).

An agent who receives a secret profit must not only account for it to his principal, but also forfeits his right to commission in respect of the transaction in connection with which the corrupt bargain was made (*q*). But where the transactions between a principal and

(*n*) *Powell* v. *Evan Jones & Co.*, [1905] 1 K. B. 11. See also *post*, pp. 126, 127.

(*o*) *Bath* v. *Standard Land Co., Limited*, [1911] 1 Ch. 618.

(*p*) *Lister* v. *Stubbs* (1890), 45 Ch. D. 1.

(*q*) *Andrews* v. *Ramsay & Co.*, [1903], 2 K. B. 635.

his agent are severable, and the agent has acted honestly in some and dishonestly in others, he is entitled to commission in all the instances in which he has been honest, but is not entitled to it in the cases in which he has been dishonest (*r*). A secret profit received by an agent without fraud in connection with some duty incidental to the main purpose of his employment cannot be retained, but in such case the agent will not forfeit his right to remuneration (*s*). An agent who receives a bribe from a third party may be dismissed without notice (*t*). Corrupt transactions with an agent are now punishable as misdemeanors, both the agent and any person corruptly dealing with him being criminally responsible (*u*).

The fact that the principal has recovered from his agent a bribe received, will not of itself prevent him from proceeding for damages against the person who paid the bribe (*x*). And further, where a contract has been entered into with an agent who has been induced to accept a bribe, the principal may refuse to be bound by the contract, irrespective of any effect the bribe may have had on the agent's mind (*y*).

A further duty of the agent is to do the work himself, and not to commit it to others for performance, for the old maxim applies,—*Delegatus non potest delegare*. "One who has authority to do an act for another must

(*r*) *Nitedals Taendstiekfabrik* v. *Bruster*, [1906] 2 Ch. 671.

(*s*) *Hippisley* v. *Knee Bros.*, [1905] 1 K. B. 1.

(*t*) *Boston Deep Sea, etc. Co.* v. *Ansell* (1888), 39 Ch. D. 339.

(*u*) Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34).

(*x*) *Mayor of Salford* v. *Lever*, [1891] 1 Q. B. 168; *Grant* v. *Gold, etc. Syndicate, Limited*, [1900] 1 Q. B. 233.

(*y*) *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369.

execute it himself, and cannot transfer it to another" (z). But this needs some modification, for though it applies where personal trust is put in the agent, or where personal skill is required, yet in many cases it does not, especially under these circumstances, (i) where custom sanctions delegation; (ii) where delegation is necessary to proper performance; (iii) where there is an agreement, express or implied, to allow it. The leading case on this part of the subject is *De Bussche* v. *Alt* (a). There, a plaintiff (resident in England) consigned a ship to G. & Co., in China, for sale on certain terms, and G. & Co., with the knowledge of the plaintiff, employed the defendant in Japan to sell it. A point arose in the action whether or not the delegation was good, and THESIGER, L.J., in giving the judgment of the court, said: The maxim (*delegatus non potest delegare*), "when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such an authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a

(z) Bacon's Abr., Auth. D.; Story, Agency, s. 14.
(a) (1878), 8 Ch. D. 286.

'sub-agent' . . . and on the other hand, to constitute in the interests and for the protection of the principal, a direct privity of contract between himself and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied, where from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute." Thus, an auctioneer must do the work himself, but if goods are given for sale at a public auction to a man known not to be a licensed auctioneer, there is authority for the agent to employ a licensed man. So, if a man employ a solicitor, there is implied authority to allow a delegation of some of the work to clerks (*b*).

An agent may not employ, save in his principal's interest, materials and information which the agent has obtained or been supplied with only for his principal and in the course of his agency (*c*).

If the agent is a *del credere agent*, *i.e.*, an agent for sale, who gives an undertaking to his employer that nothing shall be lost owing to the default of the third party, he is under the further duty of making good to

(*b*) As to delegation by directors, see *Howard's Case* (1866), L. R. 1 Ch. 561; and generally, *Catlin* v. *Bell* (1815), 4 Camp. 183; *Coles* v. *Trecothick* (1804), 9 Ves. 234, 251; and Story on Agency, ss. 14 *et seq.* As to liability for sub-agents' contracts, etc., see Story, s. 201.

(*c*) *Lamb* v. *Evans*, [1893] 1 Ch. 219; and see *Robb* v. *Green*, [1895] 2 Q. B. 315.

his principal any loss which may thus be incurred by the latter. And he will be liable though the arrangement has not been reduced to, or evidenced by, writing, for his promise to indemnify is not a guarantee within the Statute of Frauds, s. 4 (*d*).

The possession of an agent is the possession of his principal, and accordingly he cannot set up the Statute of Limitations (*e*) against his principal; but if he repudiates the character of agent and claims property in his own right, the statute will commence to run in his favour (*f*).

Rights of an Agent as against his Principal.—1. In the first place, he has a right to the remuneration agreed upon, or which may be customary in the business in which he has been engaged; *e.g.*, if A. employs B. to sell goods for him, and says nothing about commission, he is understood to agree to pay such amount as may be usual; unless, indeed, the agency be gratuitous, the consideration for the duty imposed on the agent in such cases being the trust reposed in a person who has undertaken to do work (*g*). But whatever the remuneration may amount to is a matter to be deduced from the contract itself, and is a question of fact in each particular case, and not of law. If the principal does not carry out the contract made for him, the agent nevertheless will often be entitled to his commission. Thus, in *Prickett* v. *Badger* (*h*), an agent found a

(*d*) See *Sutton* v. *Grey*, [1894] 1 Q. B. 285; and *post*, pp. 443, 444.

(*e*) *Ante*, pp. 81 *et seq.*

(*f*) *Williams* v. *Pott* (1871), L. R. 12 Eq. 149; *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437.

(*g*) *Coggs* v. *Bernard* (1704), 1 Sm. L. C. (11th ed.), p. 173.

(*h*) (1857), 1 C. B. (N.S.) 296.

purchaser, but the principal would not complete; it was decided that the agent was entitled to reasonable remuneration, WILLES, J., thinking the full amount of agreed commission to be due. In *Green* v. *Lucas* (*i*), and in *Simpson* v. *Lamb* (*k*), the same principle was adopted. In the latter case the principal sold the property himself, and the court decided that, though no action could be brought for revocation of authority, yet the agent could recover for work already done. But each case stands by itself; sometimes the facts show that, according to the agreement, the agent is to take nothing unless he completes the matter; sometimes he is to take a full commission in any event; sometimes he may get an amount proportionate to the work done; sometimes his rights are regulated by custom or usage (*l*). A fruitful source of litigation arises from any doubt whether the agent is entitled only in respect of the first transaction arising from his introduction, or whether he can demand commission on all subsequent orders from the persons introduced, and no general rule can be laid down; the parties should see that the precise terms are in the agreement (*m*).

2. An agent is entitled to be indemnified for losses and liabilities incurred by him in the course of the agency. Thus, in one case, where the agent was sued for seizing goods improperly, and it was shown that he did it bonâ fide, and at the command of his principal,

(*i*) (1875), 33 L. T. (N.S.) 584.

(*k*) (1855), 17 C. B. 603.

(*l*) See *Queen of Spain* v. *Parr* (1870), 39 L. J. Ch. 73; *Green* v. *Mules* (1861), 30 L. J. C. P. 343; *Lockwood* v. *Levick* (1860), 8 C. B. (N.S.) 603; *Tribe* v. *Taylor* (1876), 1 C. P. D. 505.

(*m*) See *Tribe* v. *Taylor*, *supra*.

he was adjudged to be entitled to indemnity (*n*). So if a principal direct his agent to engage in any enterprise in which, by any particular custom or usage of the market, liabilities are incurred, the agent will be entitled to be indemnified against these, unless the custom is inconsistent with the contract. "It is familiar law that a principal who employs an agent to purchase goods for him in a particular market is to be taken to be cognizant of and is bound by the rules which regulate dealings therein; and the agent is entitled to be indemnified by his principal for all he does in accordance with those rules" (*o*) (WILLES, J.).

To this last proposition limits have to be placed. (i) If the loss be caused by default of the agent himself, his right disappears (*p*); (ii) the custom must be one that is well known; so notorious in the market that those dealing there may easily ascertain it, and may well be supposed to have knowledge of it (*q*); (iii) the custom must be legal and reasonable, or else express knowledge of the custom should be shown to exist (*r*). Some recent cases will illustrate these rules. A stock-broker who has wrongfully sold shares as against his principal cannot claim from him by way of indemnity even such proportion of the loss as would have been payable if the contract had been duly carried out (*s*).

(*n*) *Toplis* v. *Crane* (1838), 5 Bing. N. C. 636; *Betts* v. *Gibbins* (1834), 2 A. & E. 57.

(*o*) *Whitehead* v. *Izod* (1867), L. R. 2 C. P. 228.

(*p*) *Duncan* v. *Hill* (1873), L. R. 8 Ex. 242; *Ellis* v. *Pond*, [1898] 1 Q. B. 426.

(*q*) *Grissell* v. *Bristowe* (1868), L. R. 3 C. P. 112.

(*r*) *Neilson* v. *James* (1882), 9 Q. B. D. 546; *Perry* v. *Barnett* (1885), 14 Q. B. D. 467; 15 Q. B. D. 388; *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460.

(*s*) *Ellis* v. *Pond*, [1898] 1 Q. B. 426.

Again, it is a rule on the Stock Exchange that if a broker is employed, and he becomes a defaulter, accounts opened are, as between the jobber and the broker, closed at the current prices; but, as regards the employer, they may be completed by the employer, or by another broker for him, at the employer's will. It was formerly thought that the employer had the further option of treating his contract for the sale or purchase of shares as closed at the hammer price—that is, the price fixed by the official assignee as that at which the transaction is to be closed so far as the broker and jobber are concerned (*t*). But in the recent case of *Levitt* v. *Hamblet* (*u*) this supposed rule was thoroughly discussed by the Court of Appeal, and it was decided that there is no established usage under which the client of a broker who has become a defaulter on the Stock Exchange, and whose transactions have been closed at prices fixed by the official assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the Stock Exchange.

In *Perry* v. *Barnett* (*x*) an action for losses sustained on defendant's account was brought; the defendant had instructed his agent to purchase bank shares, and before settling day repudiated the contract. The broker had to pay, and now asked to be recouped. It was admitted that the purchase was void, as not being in accordance with Leeman's Act (*y*), but a custom of disregarding this statute was shown to exist. The

(*t*) *Hartas* v. *Ribbons* (1889), 22 Q. B. D. 254; *Beckhuson* v. *Hamblet*, [1900] 2 Q. B. 18; 5 Com. Cas. 217.

(*u*) [1901] 2 K. B. 53; 6 Com. Cas. 79.

(*x*) (1885), 14 Q. B. D. 467; 15 Q. B. D. 388.

(*y*) See *ante*, p. 30.

court held, on a finding that the defendant was not acquainted with this custom, that the plaintiff could not recover, for a knowledge of an unreasonable and illegal custom will not be presumed. In *Seymour* v. *Bridge* (*z*), the facts were similar, but knowledge of the custom was assumed or proved, and the decision was against the defendant.

The last quoted case is somewhat similar to those in which it has been held that when a person at the request of another incurs some liability, which, though not legally enforceable, is paid in consequence of some moral pressure (*e.g.*, danger of expulsion from a society), the principal may be legally liable to indemnify his agent. In *Read* v. *Anderson* (*a*), an agent was employed to make a bet; the horse lost, and the agent paid; had he not done so, he would have been posted as a defaulter; it was decided that he could recover from his principal the amount paid (*b*). The line between this class of case and that represented by *Perry* v. *Barnett* (*bb*) is rather fine; MATHEW, J., thought in *Seymour* v. *Bridge* (*z*) that *Read* v. *Anderson* (*a*) covered the case before him exactly.

3. An agent has a right to a lien, the particular kind varying with the class of agent. See the chapter on "LIENS" (*c*).

4. In some cases an agent has a right to stop goods "in transitu" (*d*), as when, being agent of the con-

(*z*) (1885), 14 Q. B. D. 460.
(*a*) (1884), 13 Q. B. D. 779.
(*b*) This case was decided before the passing of the Gaming Act, 1892 (55 Vict. c. 9); though the principle of the decision is still good law, that Act would, in this particular case, have procured an opposite result.
(*bb*) (1885), 14 Q. B. D. 476; 15 Q. B. D. 388.
(*c*) *Post*, pp. 474, 475. (*d*) *Post*, pp. 267, 268.

signee, he has made himself liable for the price by having pledged his own credit (*e*). This right may not be exercised if the general balance between the principal and agent is in favour of the former.

Authority of an Agent.—This part of the subject is much mixed up with that which treats of the liabilities incurred by an agent towards third parties, and of the extent to which a principal is bound by an agent's acts; and much of the present subject may be left till we come to a consideration of such questions. The authority of an agent is said to be *general* or *special*, dependent upon whether the agency is general or of a special class (*f*). In every case it depends, as *between principal and agent*, upon the terms of their agreement, and here the authority will be strictly construed (*g*); as *between agent, principal, and third parties*, upon what is the ostensible authority given to the agent. A secret limitation of the authority is no answer to the claims of those who are not aware of any limitation—thus, A. has a shop of which B. is manager, and B. is in the habit of receiving necessary goods on credit; one day A. tells B. that for the future all things must be paid for at once, and in cash, and he withdraws B.'s authority to bind him; a creditor who subsequently supplies goods on credit of the kind B. is accustomed to take can recover against A., unless this limitation of B.'s authority has been communicated to him; and this is so even though when he supplied the goods he did

(*e*) *Hawkes* v. *Dunn* (1830), 1 C. & J. 519.

(*f*) See *ante*, pp. 113, 114.

(*g*) *E.g.*, if A. and B. have authority to do a certain act, A. cannot do it alone (Com. Dig. Atty. C. (11)).

not know that B. was an agent (*h*). So, a principal who entrusts title deeds to an agent for the purpose of borrowing a limited sum of money, will, as a condition of recovering the deeds, be liable to repay the whole amount, though the agent exceeds the limit, if the excess was advanced in ignorance of the limitation : and he will be so liable although the lender (acting in good faith) did not know that the agent had authority to borrow at all, and made no inquiry (*i*). If the agent's authority is known to be special, the third party must make himself acquainted with its limit, unless the principal leads him to infer reasonably that the authority is of a particular nature and extent (*k*).

In respect of bills of exchange a signature "by procuration" operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (*l*).

Certain classes of agents have a certain and definite authority : such as brokers, factors, auctioneers, etc. ; as to these, see *post*, pp. 150 *et seq.* But, generally, it may be said that whatever authority is necessarily required to carry out the purpose for which the agency is created will, in the absence of evidence to the contrary, be implied. Within the limits of his authority, an agent has such powers as are required for its proper exercise. Authorities "are to be construed as to include all the necessary means of executing them with effect. Thus,

(*h*) *Wattean* v. *Fenwick*, [1893] 1 Q. B. 346.
(*i*) *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173.
(*k*) Story, Agency, ss. 57 *et seq.*, s. 126.
(*l*) Bills of Exchange Act. 1882 (45 & 46 Vict. c. 61), s. 25.

an authority to receive and recover debts includes a power of arrest" (*m*). So also, a man put in charge of a shop will have implied authority to order goods for the purposes of the trade carried on ; and to receive payments from customers, and give receipts. Such implied authority, however, must be so construed as not to give a different kind of power from that involved in the original direct authority ; *e.g.*, if an estate agent be employed to *procure a purchaser* for an estate, and to advertise it, he may not actually enter into the contract of sale (*n*) ; but an authority to *sell* confers an authority to make a binding contract, including an authority to sign an agreement (*o*). So an agent appointed to receive payment of a debt must take cash only, unless it is in accordance with the ordinary course of the business to take a cheque (*p*) ; and he may not write off the debt against one due to himself ; unless authorised by a custom of which the principal has notice (*q*).

The following examples are worthy of notice. A person who employs a broker to act on the Stock Exchange impliedly gives him authority to follow the rules there established (*r*). Goods were delivered to an agent for sale at a certain place, and he was unable to sell them there ; it was decided that he had no

(*m*) *Howard* v. *Baillie* (1796), 2 H. Bl. 618. This, of course, was stated with reference to the powers of arrest then available to creditors ; but the principle remains good.

(*n*) *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674.

(*o*) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267.

(*p*) *Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451 ; *Papé* v. *Westacott*, [1894] 1 Q. B. 272.

(*q*) *Scott* v. *Irving* (1830), 1 B. & Ad. 605 ; *Sweeting* v. *Pearce*, 7 C. B. (N.S.) 449 ; *Pearson* v. *Scott* (1878), 9 Ch. D. 198.

(*r*) *Sutton* v. *Tatham* (1839), 10 A. & E. 27 ; and see *ante*, pp. 130—132.

authority to send them elsewhere in search of a market (*s*). Authority to settle losses on a policy includes a right to refer the matter to arbitration (*t*). A principal gave an agent abroad authority to purchase 100 bales of cotton, and the agent purchased 94 only, this being all that was practicable; it was held that the agent had authority to use his discretion according to the state of the market (*u*). At a meeting, at which defendant presided, a resolution was carried that a circular should be "printed and advertised at the discretion of W." as quickly as possible; W. employed a printer, and the circulars were sent to the defendant, who accepted them; there was an arrangement whereby W. was to pay, but this was not communicated to the printer, consequently the defendant was held to have authorised W. to act on his behalf, and was declared liable accordingly (*x*). An authority to "sign for me and in my name . . . any and every contract . . . and from time to time to negotiate, make sale, dispose of, assign, and transfer," certain notes, was held to authorise sale, but not pledge (*y*). Counsel has general authority to bind his client in all matters within the scope of the action, but not in matters which are collateral to it (*z*). But the ordinary doctrines of agency do not always apply to the acts of counsel. Thus, if counsel agrees to an arrangement in excess of an express authority conferred on him by his client, then, although

(*s*) *Catlin* v. *Bell* (1815), 4 Camp. 183.
(*t*) *Goodson* v. *Brooke* (1815), 4 Camp. 163.
(*u*) *Johnston* v. *Kershaw* (1867), L. R. 2 Ex. 82.
(*x*) *Riley* v. *Packington* (1867), L. R. 2 C. P. 536.
(*y*) *Jonmenjoy Coondoo* v. *Watson* (1884), 9 App. Cas. 561.
(*z*) *Matthews* v. *Munster* (1888), 20 Q. B. D. 141.

the limit put upon his authority is not known to the other side, the court will not necessarily give effect to that arrangement; this apparent exception seems to arise from the fact that the intervention of the court is necessary to make the arrangement binding (*a*).

If a principal gives authority to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bonâ fide adopts one of them and acts upon it, the principal cannot repudiate the act, though he meant the authority to be taken in the other meaning (*b*).

Breach of Warranty of Authority.—An agent who represents himself to have an authority from a principal which he really does not possess, or exceeding that which he does possess, is liable to an action at the suit of third parties for breach of warranty of authority, provided the want of authority was not known to such parties (*c*). Nor is it different if the agent bonâ fide supposed himself to have authority (*d*); even though his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge, *e.g.*, by the death or lunacy of his principal, or in the case of a company by its dissolution (*e*).

(*a*) *Neale* v. *Gordon Lennox*, [1902] A. C. 465.

(*b*) *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395.

(*c*) *Collen* v. *Wright* (1856), 7 E. & B. 301; 8 E. & B. 647; *Firbank's Executors* v. *Humphreys* (1887), 18 Q. B. D. 54; *Halbot* v. *Lens*, [1901] 1 Ch. 344; *cf. Salvesen* v. *Reder's Aktiebolaget Nordstjernan*, [1896] A. C. 302.

(*d*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114. As to the measure of damages, see *Meek* v. *Wendt* (1888), 21 Q. B. D. 126; and *Re National Palace Coffee Co.* (1883), 24 Ch. D. 367.

(*e*) *Yonge* v. *Toynbee*, [1910] 1 K. B. 215.

This doctrine is not limited to cases where the professing agent purports to *contract* on behalf of an alleged principal: any person who suffers damage by acting on the untrue assertion of authority may sue for breach of the implied warranty. Thus, in *Starkey* v. *Bank of England* (*f*), a broker, innocently acting under a forged power of attorney for the transfer of Consols, required the Bank of England in performance of their statutory duty to transfer the Consols in their books. Upon discovery of the forgery, the true owner of the Consols compelled the bank to make good the loss, and the bank was held entitled to indemnity from the broker. It will be observed that the bank made no contract of any kind, but simply performed a duty upon the faith of the alleged agency.

The Factors Act, 1889 (52 & 53 *Vict. c.* 45).—This Act codified several statutes relating to factors and mercantile agents, and it gives certain powers to agents in possession of goods or the documents of title relating to them.

The Act applies mainly to "mercantile agents," and a mercantile agent means one "having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale,

(*f*) [1903] A. C. 114. Apart from agency, a person who presents a forged transfer for registration impliedly undertakes to indemnify the company or corporation against any loss resulting therefrom (*Sheffield Corporation* v. *Barclay*, [1906] A. C. 392). In *Bank of England* v. *Cutler*, [1908] 2 K. B. 208, a broker who identified as the registered holder of certain stock a person who was fraudulently personating such holder, was held liable to indemnify the bank for the consequent loss on the ground that his conduct amounted to a request to the bank to permit the entry and registration of the forged transfer.

or to buy goods, or to raise money on the security of goods" (*g*).

The following are the chief provisions of the Act, so far as it applies to agents:

"Where a mercantile agent is, with the consent of the owner (*h*), in possession (*i*) of goods or of the documents of title to goods, any sale, pledge (*k*), or other disposition of the goods, made by him (*l*) when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person (*m*) taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same" (*n*).

The general authority of a mercantile agent to pledge goods cannot be restricted by the custom of any particular trade (not known to the pledgee) which purports to deprive the mercantile agent of such authority (*o*).

(*g*) Section 1.

(*h*) Such consent is presumed, unless there be evidence to the contrary (s. 2 (4)). Fraud (not amounting to larceny by a trick) does not negative the existence of the owner's "consent" (*Oppenheimer* v. *Frazer and Wyatt*, [1907] 2 K. B. 50).

(*i*) *I.e.*, when the goods or documents are in his actual custody, or in the custody of some other person subject to his control, or for him, or on his behalf (s. 1 (2)).

(*k*) Including lien or giving security on the goods or documents (s. 1 (5)).

(*l*) Or by his clerk or other person authorised in the ordinary course (s. 6).

(*m*) In the case of joint purchasers, the transaction will not be upheld unless they have all acted in good faith (*Oppenheimer* v. *Frazer and Wyatt*, *supra*).

(*n*) Section 2 (1).

(*o*) *Oppenheimer* v. *Attenborough & Son*, [1908] 1 K. B. 221.

If the owner withdraws his consent, a disposition to any person acting in good faith will nevertheless remain good, provided such person has not at the time of the sale or disposition received notice of such withdrawal (*p*). The agent who, by reason of being or having been in possession of goods with the owner's consent, obtains possession of the documents of title to them, is deemed to hold these documents with the owner's consent (*q*).

"A pledge of documents of title to goods shall be deemed to be a pledge of the goods" (*r*); but when a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee can acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*s*). The consideration for a sale or pledge within this Act may be payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but when goods are pledged by a mercantile agent in consideration of the delivery of other goods or documents of title to goods, or of a negotiable security, the pledgee acquires no interest in goods so pledged beyond the value of the goods or documents so delivered in exchange (*t*).

The following section deals with the rights of consignees: "Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the

(*p*) Section 2 (2).
(*q*) Section 2 (3).
(*r*) Section 3.
(*s*) Section 4.
(*t*) Section 5.

goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person" (*u*).

"Document of title" includes, for the purposes of the Act, "any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented" (*x*).

The Act preserves the rights of the true owner as between himself and the agent, and also the common law powers of the agent (*y*).

Several provisions of the Factors Act apply to a class much wider than is included in the term "mercantile agents," *e.g.*, the 8th, 9th, and 10th sections of the Act (*z*). Their general scope is such as to enable parties to deal freely in the market with those who apparently are possessed of the goods, or of the *indicia* of the property in them.

(ii) Relations with Third Parties.

Whether principal, or agent, or both, are liable on a given contract is a matter depending upon the intention of the parties and the authority of the agent, though

(*u*) Section 7.
(*x*) Section 1 (4).
(*y*) Sections 12, 13.
(*z*) See *post*, pp. 243, 275.

it must be remembered that, as regards the rights of third parties, the apparent authority is often of more importance than the real. Generally, an agent is not liable on the contract, but a principal is: but to this rule many exceptions are found, most of them depending upon this principle, that if by his conduct one person causes another to infer that a principal is being dealt with, he cannot put that other in a worse position by any subsequent disclosure of his character as agent; *e.g.*, A. owes B. money, and B. buys goods to the amount, supposing A. to be vendor; A. cannot afterwards, by showing himself to be an agent only, prevent B. from setting off the debt against the price.

(a) *Relations with Third Persons where Principal Disclosed.*—Here, in the absence of evidence to the contrary, the principal, and he alone, has liabilities and rights. But an agent may, under certain circumstances, be liable even in this case, *e.g.*, (i) if he agrees to be so; (ii) if he is commission agent for a foreign principal (*a*); (iii) where the principal does not exist, or is not in a condition to be bound by the contract (*b*); (iv) if the contract is by deed, and the agent executes it in his own name; (v) when the custom of trade makes him liable. In some of the above cases, however, the agent may incur no personal liability, as where the terms of the contract show that he was never looked to for payment (*c*). If the contract itself is reduced to writing, and in it the agent appears as principal, he is bound,

(*a*) Lord TENTERDEN in *Thomson* v. *Davenport* (1829), 9 B. & C., at p. 87; *Wilson* v. *Zulueta* (1849), 14 Q. B. 405; *Hutton* v. *Bullock* (1874), L. R. 9 Q. B. 572.

(*b*) *Kelner* v. *Baxter* (1867), L. R. 2 C. P. 174.

(*c*) *Gadd* v. *Houghton* (1876), 1 Ex. D. 357.

though as a fact it was known at the time that he was bargaining as agent only, unless he can show that the contract was so drawn up by mistake; and this follows from the general rule, that oral evidence cannot be admitted to vary a written contract (*d*).

An agent may sue on a contract though his principal be disclosed, if he has an interest (*e.g.*, lien) in the proceeds; for this reason an auctioneer may sue for the price of goods (*e*).

Moreover, when a third party, knowing who the real principal is, elects to give credit to the agent personally, and the circumstances of the case enable him to hold the agent liable, his right of action against the real principal goes. The leading case on this subject is *Paterson* v. *Gandasequi* (*f*). There the defendant, a Spanish merchant, employed L. to purchase goods for him, and the plaintiffs sent goods which L. and defendant in plaintiffs' presence inspected, and the price was discussed. L. ordered the goods, and invoices were sent to L. in his own name, the plaintiffs debiting L. as their debtor. Eventually L. failed, and an action was brought against the defendant. Judgment went for the defendant on the ground that "the plaintiffs in this case might have elected whom they would have as debtor; and here they seem to have made their election" (*g*).

(*d*) *Higgins* v. *Senior* (1841), 8 M. & W. 834. See notes to *Thomson* v. *Davenport* (1829), 2 Sm. L. C. (11th ed.), p. 379; and see *Wake* v. *Harrop* (1861), 6 H. & N. 768; 1 H. & C. 202, as to mistake.

(*e*) *Williams* v. *Millington* (1788), 1 H. Bl. 81.

(*f*) (1812), 2 Sm. L. C. (11th ed.), p. 365.

(*g*) Remarks of Grose, J., in the above case. See also *Addison* v. *Gandasequi* (1812), 2 Sm. L. C. (11th ed.), 371.

(b) *Relations with Third Persons where Principal Undisclosed.*—In this case the general rule is that the contract may be adopted against or by the principal or the agent at the wish of the parties. In *Sims* v. *Bond* (*h*), one branch of the rule was thus expressed: "where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it." In *Thomson* v. *Davenport* (*i*), the other branch of the rule was stated by TENTERDEN, C.J., as follows: "If a person sells goods (supposing at the time of the contract that he is dealing with a principal) but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal."

But an agent contracting merely as such for an unnamed principal will not incur personal liability, unless by reason of some usage or custom which is not inconsistent with any express term of the contract (*k*).

If the principal sues upon the contract, he must do so subject to any right of set-off that the third party may have acquired against the agent before he knew him to be acting for a principal (*l*). In *Rabone* v. *Williams* (*m*), factors sold to Williams, and when the undisclosed principal sued, Williams claimed to set off

(*h*) (1833), 5 B. & Ad., at p. 393.

(*i*) (1829), 9 B. & C., at p. 86.

(*k*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482.

(*l*) *George* v. *Clagett* (1797), 2 Sm. L. C. (11th ed.), p. 138, and for a later example, see *Montagu* v. *Forwood*, [1893] 2 Q. B. 350.

(*m*) (1785), 7 T. R. 360 n.

a debt due by the factors to him, and the claim was allowed. This set-off cannot be allowed if the third party was aware that the agent was really such, although he was not aware of the identity of the principal, nor if by the use of ordinary care, or by making ordinary inquiries, he might have known ; thus in the case of a sale he should show that the contract was made by a person to whom the principal had intrusted possession of the goods, that that person sold them as his own goods in his own name, and that he (the buyer) reasonably supposed the agent to be the principal, and that the set-off claimed accrued before he was undeceived (*n*). In *Cooke* v. *Eshelby* (*o*), L. & Co. sold C. cotton in their own names, really on behalf of M. C. knew that L. & Co. sometimes sold for principals and sometimes on their own account, but did not know, and did not inquire whether in this case they had or had not principals. It was decided that money owed by L. & Co. could not be set off against the price of the cotton ; Lord Watson saying, that to entitle a purchaser to set off a debt due by an agent against one due to the principal, it must be shown "that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser, a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal."

If the agent sues on the contract, a debt due by the principal cannot be set off against it, for the principal being undisclosed no credit was given to him, nor was

(*n*) *Semenza* v. *Brinsley* (1865), 18 C. B. (N.S.) 467 ; *Borries* v. *Imperial Ottoman Bank* (1874), L. R. 9 C. P. 38.

(*o*) (1887), 12 App. Cas. 271.

there any concealment that could be injurious to the buyer.

If in the contract the agent describes himself as principal, there is no right of action in the actual principal; the agent alone can sue. In *Humble* v. *Hunter* (*p*), an agent entered into a charter-party and described himself as "owner" of the ship; it was held that evidence was not admissible to show that another was principal, nor could that other sue on the contract. For if the principal allows the agent to represent himself as principal, the agent alone can sue on the contract made.

The third party (as stated above) may bring his action against either the agent or the undisclosed principal, and oral evidence will be admitted to show that a written contract purporting to be made by a certain person is in reality made by him as agent. The rule seems to be, that though verbal evidence cannot be allowed to discharge a person, yet it will be admissible to show that a party apparently not liable is liable in reality. Thus, A. agrees in writing with B. to buy goods, nothing about C., the principal, being contained in the memorandum. If C. wants to sue, or if A. wants to gets discharged, oral evidence will not be admitted to show the facts, but if B. wants to sue C. he may prove orally that C. is the principal (*q*).

The agent must, however, establish privity of contract between his principal and the third party, to render the former liable. Custom may do this. Thus, a stock-

(*p*) (1848), 12 Q. B. 310.

(*q*) See notes to *Thomson* v. *Davenport* (1829), 2 Sm. L. C. (11th ed.), p. 379; *Trueman* v. *Loder* (1840), 11 A. & E. 589; *Higgins* v. *Senior* (1841), 8 M. & W. 834.

broker who lumps the orders of several clients in one contract (apportioning the shares purchased in his books) will under the special usage of the Stock Exchange establish privity of contract between the jobber and the clients for whom he (the broker) acted as agent (*r*).

But though as a rule the principal may be sued, there are exceptions : (i) when custom makes the agent liable ; (ii) when the principal is a foreign merchant represented here by a commission agent (*s*) ; (iii) the remedy against the undisclosed principal may also be lost to the extent that the principal has in the meantime honestly settled with his agent. This rule applies strictly where the existence of a principal at all was not disclosed at the time of the contract ; but if a principal was known to exist although unnamed, a settlement by him with his agent will only be valid against third parties if their conduct justified him in assuming that they looked only to the credit of the agent (*t*). Thus, defendants employed C. to buy oil ; C. bought some of plaintiffs, saying it was for principals, but not naming them ; the terms were cash on delivery ; it was not an invariable custom to pay on delivery ; defendants, supposing the cash had been paid (which was not the fact), settled with C. ; when C. became insolvent, plaintiffs sued the defendants :—*Held*, defendants must pay, though if the plaintiffs had led the defendants to believe that the agent and they had settled matters,

(*r*) *Scott* v. *Godfrey*, [1901] 2 K. B. 726 ; 6 Com. Cas. 226.

(*s*) *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598, 605 ; *Elbinger Co.* v. *Claye* (1873), L. R. 8 Q. B. 313.

(*t*) *Irvine* v. *Watson* (1880), 5 Q. B. D. 102, 414 ; *Davison* v. *Donaldson* (1882), 9 Q. B. D. 623.

the defendants would have been protected (*u*). So in *Armstrong* v. *Stokes* (*x*), it was decided that a vendor who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal if the principal has bonâ fide paid the agent at a time when the vendor still gave credit to the agent, and knew of no principal.

The liability of principal and agent is alternative and not joint, and though the creditor may be entitled to elect against which of them he will enforce his remedies, any unequivocal acts showing an intention to hold one of them liable will discharge the other (*y*). If the creditor obtains judgment on the contract against the principal, he cannot afterwards get judgment against the agent, nor, if he gets it against the agent, can he afterwards succeed against the principal (*z*).

Rights and Duties when the Principal is Non-existent.—Although an agent expressly contracting as such cannot generally sue in his own name, he may do so if the contract has been partly performed after the other party has had full notice that the supposed agent was the real principal (*a*), and in a charter-party a person contracting as "agent of the freighter" may declare himself to be the real principal or adopt the character of freighter himself (*b*).

(*u*) *Irvine* v. *Watson* (1880), 5 Q. B. D. 102.

(*x*) (1872), L. R. 7 Q. B. 598.

(*y*) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345. See also, *ante*, p. 144.

(*z*) *Kendall* v. *Hamilton* (1879), 4 App. Cas.: *per* CAIRNS, L.C., at p. 514.

(*a*) *Rayner* v. *Grote* (1846), 15 M. & W. 359.

(*b*) *Schmalz* v. *Avery* (1851), 16 Q. B. 655; *Harper & Co.* v. *Vigers Bros.*, [1909] 2 K. B. 549.

If a professing agent names a principal who is non-existent or incapable of contracting, the agent may himself be sued. In *Kelner* v. *Baxter* (*c*), the defendants, on behalf of an intended company, agreed with the plaintiffs to pay for goods to be supplied to the company; after formation of the company, the goods were supplied and consumed, but the court held that defendants, having contracted as agents for a non-existent company, were personally liable, and that no subsequent ratification or substitution of liability was of any avail to them without the consent of the plaintiffs.

Liability of Principal for Money Borrowed without Authority.—In some cases where an agent borrows money on behalf of another without any authority or in excess of his authority, although the mere fact of the borrowing may impose no liability on the principal, yet the lender acting in good faith has an equitable right to recover against the principal any part of the money borrowed which has in fact been applied in paying legal debts and obligations of the principal (*d*).

Liability of a Principal for his Agent's Torts.—It is a general rule that a principal is liable for the wrongs of his agent committed within the scope of the authority where the wrongful act is done and purports to be done on behalf of the principal (*e*), though no express

(*c*) (1867), L. R. 2 C. P. 174; and see *Re Empress Engineering Co.* (1881), 16 Ch. D. 125; *Scott* v. *Lord Ebury* (1867), L. R. 2 C. P. 255.

(*d*) *Blackburn, etc. Building Society* v. *Cunliffe Brooks & Co.* (1883), 22 Ch. D. 61; affirmed *sub nom. Cunliffe Brooks & Co.* v. *Blackburn, etc. Building Society* (1884), 9 App. Cas. 857; *Bannatyne* v. *MacIver*, [1906] 1 K. B. 103.

(*e*) *Thorne* v. *Heard*, [1895] A. C., at p. 502.

command of the principal can be shown (*f*). In other cases the agent alone is liable, even though the tort was committed solely for and on behalf of his principal. The liability of the principal, where such exists, is no answer to an action against the agent; the latter is also liable (*g*); but it will be remembered that an agent who innocently commits a tort, within the scope of his authority, is entitled to an indemnity from his principal (*h*).

CLASSES OF AGENTS (*i*).

Factors.—A factor is an agent "employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation" (*k*). He is sometimes called a consignee and sometimes a commission agent; but a salaried servant who holds goods for his master is not of necessity a factor, although he may have a special power of sale. A broker and a factor are different sorts of agents, the chief points of difference being that the broker has not possession of the goods, whereas the factor has (*l*), and whilst the factor may sell in his own name, the broker may not (*m*). The powers of a factor are: (i) to sell in his own name (*m*), subject to the ordinary rules relating to

(*f*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259; *Udell* v. *Atherton* (1861), 7 H. & N. 172; *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; *cf. Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439.

(*g*) See *Peto* v. *Blades* (1814), 5 Taunt. 657.

(*h*) *Ante*, p. 129.

(*i*) "Mercantile agents" is a term which covers many of the following: the meaning of the term "mercantile agent," and the position of those who fall within it are referred to *ante*, pp. 138—141.

(*k*) Story, Agency, s. 33. See the whole section.

(*l*) See judgment in *Stevens* v. *Biller* (1884), 25 Ch. D. 31.

(*m*) See *Baring* v. *Corrie* (1818), 2 B. & Ald., at p. 143.

sales for undisclosed principals ; (ii) to give a warranty, if it is usual in the course of the business (*n*) ; (iii) to receive payment and give valid receipts (*o*), or sell on credit to a reasonable extent (*p*) ; (iv) he has an insurable interest in the goods (*q*) ; (v) since the passing of the Factors Acts he has powers of pledging ; (vi) he has a lien for the general balance of his charges on any goods that have come to him *quâ* factor and on the proceeds of such goods (*r*). This lien he loses if he delivers possession of the goods to the owner (*s*), but a right of set-off which the third party may have against his principal will not affect his lien (*r*). It has been decided, that if he becomes surety for his principal he has a lien to the extent of his liability (*r*). Even if he sells the goods in a manner specially directed by his principal, and in his principal's name, his lien still attaches (*t*).

Brokers.—A broker is defined by Story (*u*) to be "an agent employed to make bargains and contracts in matters of trade, commerce, or navigation between other parties for a compensation commonly called brokerage." He is an agent of a mercantile character, and one who makes a merely personal contract for another is not strictly a broker ; *e.g.*, A. makes an

(*n*) *Brady* v. *Todd* (1861), 9 C. B. (N.S.) 592 ; 30 L. J. C. P. 223.

(*o*) *Drinkwater* v. *Goodwin* (1775). 1 Cowp. 251 ; *Fish* v. *Kempton* (1849), 7 C. B. 687 ; 18 L. J. C. P. 206.

(*p*) *Houghton* v. *Matthews* (1803), 3 B. & P., at p. 489.

(*q*) *Post*, p. 353.

(*r*) *Drinkwater* v. *Goodwin*, *supra*.

(*s*) *Kruger* v. *Wilcox* (1755), Amb. 252.

(*t*) *Stevens* v. *Biller* (1884), 25 Ch. D. 31.

(*u*) Section 28 : and see BRETT, J., in *Fowler* v. *Hollins* (1872), L. R. 7 Q. B., at p. 623.

agreement on behalf of B. to sing at a concert; A. would not be a broker (*x*).

Brokers were at one time regulated and controlled by the Corporation of London; this is so no longer.

They are distinguishable from factors: factors have possession of the goods (*y*), and brokers have not; moreover, whilst a factor can sue and act in his own name, a broker cannot; factors may buy and sell in their own names; brokers (apart from special custom) cannot (*z*). A broker's mode of dealing is as follows: when he makes a contract the terms should be entered by him in his book and signed by him, and memoranda sent to each party; that sent to the buyer is called the *bought note*, that sent to the seller the *sold note*. Ordinary forms of these notes are: "bought for you of C. D."; "sold for you"; "bought of you by me." A broker is primarily agent for the vendor, but when the bargain is completed, he represents both parties; therefore a signed entry of the contract in the broker's book is sufficient to satisfy s. 4 of the Sale of Goods Act, 1893 (*a*). If there is no signed entry, but bought and sold notes, which correspond and contain all the terms of the bargain, are signed by the broker and delivered to the parties, these constitute a sufficient memorandum. If the bought and sold notes differ, and

(*x*) See *Milford* v. *Hughes* (1847), 16 M. & W. 174.

(*y*) Brokers are mercantile agents, but as they are not, as brokers, entrusted with possession of the goods, they do not come within the Factors Act 1889 (52 & 53 Vict. c. 45). See *ante*, p. 138, and see *Cole* v. *North Western Bank* (1874), L. R. 9 C. P. 470; 10 C. P. 354.

(*z*) See *Baring* v. *Corrie* (1818), 2 B. & Ald. 137, 143, 148; *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169.

(*a*) *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777.

there is no entry (or an unsigned entry only), the contract falls through (*b*).

Generally speaking a broker is not liable on the contract, if he is known to be contracting *quâ* broker merely, though the name of the principal be not disclosed in the contract note (*c*); but he may be made liable by custom (*d*), or contract, or if on the note he appears to contract for himself as principal. In accordance with general principles of agency, the other party may hold the undisclosed principal liable. Brokers have not possession of goods, and hence they have no lien; but to this there is an exception in the case of an insurance broker, who has a lien on the policy for his general balance, and this extends even against the principal of an agent who employed him, provided that he had no notice of the agent's character (*e*).

Insurance Brokers.—An insurance broker is the name given to an agent who is employed to negotiate a policy of marine insurance. He stands in a peculiar position. "According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter.

(*b*) *Sierewright* v. *Archibald* (1851), 17 Q. B. 103. The decisions on the effect of brokers' books and notes are very conflicting. The authorities are fully considered and general propositions deduced from them in Benjamin on Sale (5th ed.), pp. 284—305.

(*c*) *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374.

(*d*) *Fleet* v. *Murton* (1872), L. R. 7 Q. B. 126; in *Pike* v. *Ongley* (1887), 18 Q. B. D. 708, a hop-broker was, in consequence of custom, held liable for non-delivery when a contract note was worded thus: "Sold by [*defendant*] to [*plaintiff*] for and on account of owner."

(*e*) *Mann* v. *Forrester* (1816), 4 Camp. 60.

But as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured and to pay it to the underwriters" (*f*). Hence the broker is debtor to the underwriter and creditor of the assured for the premiums; he receives the policy from the underwriters, over which he has a lien as against the assured for the premiums and charges (*g*); the underwriters cannot sue the assured for the premiums; but in the event of a loss the assured may sue the underwriters direct. It may be that the underwriter and the broker have cross-claims against one another. Can the underwriter assert such set-off against the claim of the assured? As a rule he cannot, but usage, known to the assured at the date of effecting the policy, will authorise such a set-off; so also may undue delay on the part of the assured prejudicing the position of the underwriter or the state of his accounts with the broker (*h*). The insurance broker must prepare for his principal a proper policy duly stamped; and he must exercise diligence in procuring an adjustment in the event of a loss covered by the policy.

(*f*) *Per* BAYLEY, J., in *Power* v. *Butcher* (1830), 10 B. & C., at pp. 339, 340; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 53 (1); and see *Universo Insurance Co. of Milan* v. *Merchants' Marine Insurance Co.*, [1897] 2 Q. B. 93.

(*g*) Marine Insurance Act, 1906, s. 53 (2); and see *Fisher* v. *Smith* (1879), 4 App. Cas. 1.

(*h*) *Scott* v. *Irving* (1831), 1 B. & Ad. 605, 613.

Shipbroker.—A shipbroker is an agent employed to arrange for the chartering of ships ; if a charter-party is signed, he generally becomes entitled to commission from the shipowner.

Bankers.—The banker is the agent of the customer to pay sums of money as ordered, but the true relationship between banker and customer is that of debtor and creditor (*i*) ; the banker being creditor when the customer's account is overdrawn, the customer being the creditor when the balance is in his favour. The customer is entitled to draw cheques on the banker to the extent of the money standing to his credit (*k*) ; the banker has a general lien on all securities of the customer deposited with him as banker to secure any sum in which the customer may be indebted to the banker unless there be an express contract, or circumstances that show an implied contract inconsistent with lien (*l*). With regard to bills : a banker has authority to pay bills accepted by the customer and made payable at his bank (*m*), but he is not bound to do so (*n*).

The position of a banker who pays a forged instrument or a genuine instrument with a forged indorsement is dealt with hereafter (*o*).

Auctioneer.—An auctioneer is a "person authorised to sell goods or merchandise at a public auction or sale

(*i*) *Roberts* v. *Tucker* (1850), 16 Q. B. 560.

(*k*) *Pott* v. *Clegg* (1847), 16 M. & W. 321. When the cheque has been paid it becomes the property of the drawer, but the banker may keep it so long as it is wanted as a voucher.

(*l*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787.

(*m*) *Kymer* v. *Laurie* (1849), 18 L. J. Q. B. 218.

(*n*) Lord MACNAGHTEN in *Bank of England* v. *Vagliano*, [1891] A. C., at p. 157.

(*o*) *Post*, p. 346.

for a recompense" (*p*). He is agent for the seller (with authority to do all such acts as come within an auctioneer's province), and when the goods have been knocked down, for the buyer also, and his signature is then sufficient to satisfy the requirements of s. 4 of the Statute of Frauds or s. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), unless, indeed, he is himself the vendor (*q*). Unless the principal is disclosed, he is personally liable, and may himself sue. He must not delegate his authority (*r*), he should sell only for cash (*s*), and at the best price, is responsible to his principal for loss sustained through his delivering the goods without receiving the price (*t*), and he is answerable for the proper storage of goods whilst they are with him. He has possession of the goods, a special property in them, and a lien on them for his charges (*t*). He has implied authority to receive the proceeds of the sale of goods, but only the deposit on a sale of land (*u*); he has also implied authority to sell goods without reserve, and if he does so where a reserve has been put on the price, the seller cannot set up as against the buyer any such limitation of the auctioneer's authority, unless, of course, the buyer was aware of it (*x*).

(*p*) See Story's Agency, s. 27. An auctioneer must have a licence (8 & 9 Vict. c. 15, ss. 2, 4).

(*q*) *Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333. As to the effect of the clerk's signature, see *Bird* v. *Boulter* (1833), 4 B. & Ad. 443, and *Belt* v. *Balls*, [1897] 1 Ch. 663.

(*r*) *Coles* v. *Trecothick* (1804), 9 Ves. 234, 251.

(*s*) Unless it is customary to accept a cheque, and he acts without negligence in taking one (*Farrer* v. *Lacy* (1886), 31 Ch. D. 42).

(*t*) *Williams* v. *Millington* (1788), 1 H. Bl., at p. 84.

(*u*) *Williams* v. *Millington*, *supra*, as to goods; *Sykes* v. *Giles* (1839), 5 M. & W. 645, as to land.

(*x*) *Rainbow* v. *Howkins*, [1904] 2 K. B. 322.

An auctioneer who sells on behalf of A. goods which really belong to B., and who delivers the goods to the purchaser, is liable in damages at the suit of B., though he acted without knowledge of B.'s rights (*y*); but an auctioneer will not be so liable if he merely settles the price and receives his commission, taking no part in actually transferring the property (*z*), or if the circumstances of the case enable him to claim the protection of the Factors Act, 1889 (52 & 53 Vict. c. 45) (*a*).

Foreign Commission Agent.—Where an agent buys from, or sells for, a foreign principal, it is often a matter of difficulty to determine whether, in a given transaction, he is a vendor or a commission agent, *i.e.*, whether the case is one of sale or of agency. In *Ireland* v. *Livingston* (*b*), BLACKBURN, J., in giving his opinion in the House of Lords, said that a foreign commission agent buys goods within a given price named by his principal, and must charge his principal what he pays for them, *plus* his commission, and no more; but he is, subject to this, rather a vendor than an agent; the parties who supply him with the goods look to him and not to his principal, and the agent has no implied authority to pledge his principal's credit to them. A foreign commission agent has, ordinarily, no authority to make a contract between the home merchant and the foreign producer (*c*). The foreign

(*y*) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495, 500.

(*z*) *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*a*) *Shenston* v. *Hilton*, [1894] 2 Q. B. 452.

(*b*) (1872), L. R. 5 H. L. 395, at pp. 408, 409.

(*c*) BLACKBURN, J., in *Robinson* v. *Mollett* (1875), L. R. 7 H. L., at p. 810; *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B., at p. 605.

commission agent has the right to stop the goods *in transitu* when a vendor could stop them (*d*).

Wife.—A husband is bound to support his wife save under peculiar circumstances which need not be dealt with here, and if he fails to do so without just excuse, she may pledge his credit for necessaries. This is the only implied authority which marriage gives to a wife, and the presumption that she has such authority to pledge her husband's credit may be rebutted by proof that he made her a sufficient allowance, although this fact was not known to the person who supplied the necessaries (*e*). But the husband may expressly authorise the wife to bind him by contract, or may so act as to be estopped from denying that he has done so. Thus, if the husband has been in the habit of allowing the wife to incur debts on his credit, and has paid the money without saying anything that would lead a tradesman to believe that the authority was not given or was revoked, the tradesman may assume that the wife has authority until the contrary is notified to him. But unless the husband so misleads the tradesman, he may revoke any authority given to his wife without notice of any kind (*e*).

Miscellaneous.—The rights and duties of agents in their capacity of partners (*f*), stockbrokers (*ff*), shipmasters (*g*), and managing-owners (*h*), are dealt with in other parts of this Work.

(*d*) *Ante*, p. 269; *Ireland* v. *Livingston*, L. R. 5 H. L., at p. 409.
(*e*) *Debenham* v. *Mellon* (1881), 6 App. Cas. 24; *Morel Bros.* v. *Westmorland*, [1904] A. C. 11.
(*f*) *Post*, p. 166; and Story's Agency, s. 37.
(*ff*) *Post*, pp. 511 *et seq.*
(*g*) *Post*, pp. 488, 489; and Story's Agency, s. 36.
(*h*) *Post*, p. 487; and Story's Agency, s. 35.

PARTNERSHIP (*a*).

The law of partnership is concerned partly with the rights and duties of partners between themselves and partly with the legal relations between partners and third persons which flow from or are incident to the formation of a partnership. It is only possible in this book to give an outline of the subject and special works must be consulted for fuller information. The chief of these are Sir Nathaniel Lindley's work, and Sir Frederick Pollock's Digest of the Law of Partnership (*b*). The Partnership Act, 1890 (53 & 54 Vict. c. 39) (to which the sections mentioned in the notes to this chapter refer), is a statute which consolidated and codified the law of partnership; and though it does not contain the whole of that law, the main principles of it are now authoritatively settled by the statute.

Definition of a Partnership (*c*).

"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit. But the relation between members of any company or association which is—

"(a) registered as a company under the Companies Act, 1862, or any other Act of Parliament

(*a*) In this chapter the references to sections are to those of the Partnership Act, 1890 (53 & 54 Vict. c. 39).

(*b*) Underhill's Law of Partnership is a very useful book for students.

(*c*) Section 1.

for the time being in force and relating to the registration of joint stock companies (*d*); or

"(b) formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

"(c) a company engaged in working mines within and subject to the jurisdiction of the Stannaries (*e*):

"is not a partnership within the meaning of this Act."

Partnerships, then, must be distinguished from trading companies; "the law of unincorporated companies is composed of little else than the law of partnership modified and adapted to the wants of a large and fluctuating number of members" (*f*), and the same may (to a certain extent) be said of those which are incorporated. But the requisite modifications and adaptations in the case of incorporated companies are now so considerable that company law has become a branch distinct from that of its parent, partnership law. The main difference between a company and a partnership is this, that the formation and existence of a partnership depends upon the mutual trust in, and personal relationship of, the members to each other, whereas the formation and existence of a company does not depend to any extent on this; further, whilst in a partnership every member is entitled to take part in the

(*d*) The Act at present in force is the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). See *post*, pp. 196 *et seq.*

(*e*) The Stannaries Court has been abolished, and the Act must now be construed as referring to mines which would otherwise have been subject to its jurisdiction. See 59 & 60 Vict. c. 45, s. 3.

(*f*) Lindley, Introductory Chapter (4th ed.).

management of the business unless he bargains away his right, in a company the management is left to specified officers (*g*).

A partnership may not consist of more than twenty persons, or, in the case of a banking firm, ten. Associations exceeding these numbers must be registered under the Companies (Consolidation) Act, 1908, or incorporated by Act of Parliament or letters patent (*h*).

In addition to defining "partnership" in a general way, and then expressly excluding bodies which would otherwise answer the terms of the definition, the Act (*i*) lays down certain further rules for determining the existence of a partnership. These rules define the principles applicable to the consideration of typical cases, and serve very materially to elucidate and explain the meaning of "partnership." They are as follows:

"(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits (*k*).

"(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right

(*g*) It may be doubted whether these differences always exist when the company is a "private company." In such cases the fact of incorporation and the wording of the Partnership Act distinguish companies from partnerships.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1. The restriction, however, does not apply to companies working mines within the Stannaries (*ibid.*).

(*i*) Section 2.

(*k*) Section 2 (1).

or interest in any property from which or from the use of which the returns are derived.

"(3) The receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business, and in particular—

"(a) The receipt by a person of a debt or other liquidated (*l*) amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such :

"(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make [him] a partner in the business or liable as such :

"(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business, or liable as such :

"(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the

(*l*) *I.e.*, ascertained.

lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto :

"(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such."

Whether a given person is or is not a partner depends upon the facts of the case and the intention of the parties. At one time it was considered that receipt of part of the profits of itself was conclusive proof of partnership, but this is not so (*m*). In *Cox* v. *Hickman* (*n*), the facts were these : A trader owed money to many creditors, and these entered into an arrangement with him, whereby he agreed to carry on the business under their superintendence, and gradually to pay off their debts out of a share of the profits. The case was carried up to the House of Lords, where it was decided —somewhat against what then seemed the current of authority—that such an arrangement did not constitute a partnership *per se*, and the test laid down was : did the debtor carry on the business for and on behalf of the creditors so as to constitute the relation of agent and principal between them? The Act now states the law as declared in *Cox* v. *Hickman*.

Partnership is therefore not the same as co-ownership ; the former may include the latter, but the

(*m*) *Mollwo March & Co.* v. *Court of Wards* (1872). L. R. 4 P. C. 419.
(*n*) (1860), 8 H. L. Cas. 268.

converse will not apply. They may be thus distinguished: (i) Co-ownership is not necessarily the result of agreement, partnership is; *e.g.*, A. gives land to B. and C. in common; B. and C. are not partners, but may become so by agreement among themselves. So the co-owners of a ship are not necessarily partners, and it needs an agreement, express or implied, to make them so (*o*); (ii) Co-ownership does not, of necessity, involve the idea of working for profit; partnership does; (iii) A co-owner has a right of free disposition over his property without the consent of his co-owner; a partner who desires to replace himself by another cannot, in the absence of agreement, do so without the consent of his copartner.

Sharing profits is strong, though not conclusive, evidence of partnership (*p*). At the same time the court will look at the whole of the evidence, and draw the fair inference of fact; only when nothing more is known than that profits are shared, does a presumption of partnership arise which must be rebutted (*p*).

The Act further provides (*q*) that if any person to whom money has been advanced on a contract (*r*) to pay a rate of interest varying with the profits, or any buyer of a goodwill who has engaged to pay the vendor a portion of the profits in consideration of the sale, shall be adjudged a bankrupt, or enter into an arrangement

(*o*) It must be remembered that a person may be liable to creditors as a partner, though in reality he is not a partner.

(*p*) *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238; and see *Davis* v. *Davis*, [1894] 1 Ch. 393, 399, 401; *Holtom* v. *Whichelow* (1895), 64 L. J. Q. B. 170; *King* v. *Whichelow*, *ibid.*, 801.

(*q*) Section 3.

(*r*) Whether such contract be in writing or not (*In re Fort*, [1897] 2 Q. B. 495).

to pay his creditors less than twenty shillings in the pound, or die in insolvent circumstances, the lender of any such loan shall not be entitled to recover anything in respect of his loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

Formation of the Contract.

The contract is formed by consent alone, and no particular formality is required. The agreement may therefore be verbal or implied from conduct, but the general practice is to have a written agreement containing the terms on which the partners are to carry on their business, and this document is styled the *Articles of Partnership*. This document may be a deed, but it is not necessary that the agreement should be under seal.

Who may be Partners.

Alien *enemies* may not be partners of an Englishman, and a partnership between an alien and an Englishman is dissolved when war breaks out (*s*). Lunacy of a partner will not *ipso facto* dissolve an already existing partnership, but it will be a ground on which the court may decree dissolution. An infant may be a partner, and, until his contract of partnership be disaffirmed, he is a member of the trading firm, but he does not thereby render himself personally liable to creditors (*t*). With

(*s*) *Griswold* v. *Waddington* (1819), 16 Johnson Reports, 438 (New York).

(*t*) *Lovell* v. *Beauchamp*. [1894] A. C., at p. 611, *per* Herschell, L.C.

these exceptions, the general rules of contract relating to the capacity of parties will apply to the present subject.

New partners may be admitted, provided the legal number is not exceeded (*u*), but, of course, the consent of all the original partners must first have been obtained, either in the original articles or by subsequent agreement. In some respects the introduction of a new partner may be regarded as an act tacitly dissolving the old and creating a new firm.

RIGHTS AND DUTIES.

(i) Liabilities.

Liability on Contracts.—Every partner is liable for the debts incurred by or on behalf of the firm in the ordinary course of business; in fact, to this extent, each partner is an agent of and for the others (*x*). This liability extends to wrongful acts done in furtherance of the partnership business. Thus, where it was within the course of a business to obtain information by legitimate means as to contracts made by competing firms, and one partner bribed the clerk of a competitor to disclose such information, the firm was held liable in damages (*y*).

But partners are not liable on contracts entered into by members of the firm outside the scope of the business of the firm, unless the partner was, in fact, specially authorised to make the contract (*z*). The implied

(*u*) *Ante*, p. 161.
(*x*) Section 5.
(*y*) *Hamlyn v. Houston & Co.*, [1903] 1 K. B. 81.
(*z*) Section 7.

authority of a partner to bind his firm by acts done in the ordinary course of business cannot be limited by secret instructions, and a party who enters into a contract made by a partner in the ordinary course will be entitled to enforce it against the firm, notwithstanding any limitation of authority, unless he knew of it at the time of entering into the contract, or unless he did not know that he was dealing with a partner (*a*).

The liability on a partnership debt is joint, not several (*b*). But the estate of a deceased partner is severally liable in due course of administration for the debts and obligations of the firm while he was a partner, subject to the prior payment of his separate debts (*c*). This must not be misunderstood. As a general rule every partner is liable for every penny of the firm's debts, and the creditor has the option to sue any or all of them. If he obtains judgment against the firm, he may issue execution against the property of the members, and is not confined to satisfaction out of the joint property. The liability is joint, but all are liable. He may sue each partner separately, but if he obtains *judgment* against any of them he cannot enforce the judgment against any but those against whom it was pronounced, nor can he afterwards get judgment against the others ; for the liability being a joint—*i.e.*, a single, solid—liability, has become merged in the judgment. Nor are his rights different, though he does not get any payment under the judgment. Thus

(*a*) Sections 5, 8.

(*b*) Section 9 ; and see *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 ; *Badeley* v. *Consolidated Bank* (1887), 34 Ch. D. 536 ; reversed on another point, 38 Ch. D. 238.

(*c*) Section 9. See *Bagel* v. *Miller*, [1903] 2 K. B. 212.

in *Kendall* v. *Hamilton* (*d*), A. and B. (partners) borrowed money from C. ; eventually C. sued them on the loan, and obtained a judgment which was not satisfied. Afterwards C. discovered that D. was a partner with A. and B. at the date of the loan, but it was decided that C. had lost his remedy against D., as the joint liability had merged in a judgment which was not pronounced against D. Had D. been dead, and his estate been in course of administration, D.'s estate would have been severally liable, *i.e.*, liable on a separate contract to the same effect as the joint one, and this would not have been merged by a judgment against the other contractors. The above doctrine of merger has no application where there are distinct causes of action ; so that if a partner gives his own cheque for the price of goods sold to the firm, the creditor may, if the cheque is dishonoured, recover judgment upon it, without prejudicing his rights to sue the firm or any member of it for the price of the goods, if his judgment remains unsatisfied (*e*).

Outgoing Partners.—When a partner retires, the other partners may agree to hold him free of all liabilities already incurred, and this, if assented to by the creditors, will give him a complete release ; if the creditors are not parties to this agreement, either expressly or by implication, so far as they are concerned, he is still a debtor (*f*) ; but he may have rights of indemnity against his late partners. Thus, A. and B. are bankers. C. and D. are admitted as partners, and

(*d*) (1879), 4 App. Cas. 504.
(*e*) *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108.
(*f*) Section 17 (2), (3).

notice of this reaches the customers ; soon after, A. and B. die, but C. and D. carry on the business under the old name, and depositors, prior to the death of A. and B., leave their money with C. and D., receiving interest from the bank after the death of the old partners ; the bank fails, and the depositors prove against C. and D. ; this conduct as a whole may amount to a tacit acknowledgment of the release of A. and B., and of the substitution of C. and D. as debtors. Such a release would result from what is called "*novation*" (the substitution of a new debtor for an old one) ; but the party desirous of setting up such a release must be in a position to show conduct on the part of the creditor inconsistent with a continuance of his liability, conduct from which an agreement to release may be inferred (*g*).

If a member of a firm retires on an agreement with his partners that he shall in future be regarded merely as a surety for the firm's existing debts, the creditors who know this must treat the retiring partner as a surety, and may release him by giving time to the other partners (*h*).

A change in the constitution of a firm will terminate a continuing guarantee given to the firm or to a third party in respect of the transactions of the firm so far as relates to future transactions, unless agreement to the contrary be made (*i*).

In this statement of the law, frequent mention has been made of the expression "the firm," but in law a

(*g*) *Per* LINDLEY, L.J., in *Rouse* v. *Bradford Banking Co.*, [1894] 2 Ch., at p. 54 ; and see *Re Head*, [1893] 3 Ch. 426, with which *cf.* *Bilborough* v. *Holmes* (1877), 5 Ch. D. 255.

(*h*) *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586.

(*i*) Section 18.

firm, as such, is scarcely recognised ; in fact, until the present rules of procedure came into force, it is not too much to say that its existence was not recognised. "The firm" is simply a short name substituted for the names of the members composing the partnership ; it is a description and a description only (*k*). But partners may now sue or be sued in the firm name.

Incoming Partners.—A new partner is not liable for debts incurred before he entered the firm (*l*), save by special agreement ; this agreement can be enforced by any of the parties to it, but not by any creditors merely as such. Thus, if on June 1st, A. & Co. owe B. £500, and on June 2nd C. joins A. & Co., agreeing to give a premium and to be answerable proportionately to his interest for the £500, B. cannot sue C. unless he, B., is a party to the contract, and gives consideration ; *e.g.*, agrees, if C. makes himself partly responsible, to give time to the firm or to release an old partner (*m*).

Persons Liable as Partners by Holding out.—Generally speaking, the partners alone are liable, but there are classes of persons who, although not partners, are treated by law as such ; are, in fact, estopped by their conduct from denying themselves to be members of the debtor firm.

Those who, not being partners, are so treated, have been styled *quasi*-partners, and they become such in virtue of the rule that "where a man holds himself

(*k*) See JAMES, L.J., in *Ex parte Corbett* (1880), 14 Ch. D. 126.

(*l*) Section 17 (1).

(*m*) See *Rolfe* v. *Flower* (1866) (a case where such an arrangement was implied), L. R. 1 P. C. 27.

out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel" (*n*). The contract is made on his credit, and he is answerable if loss is incurred, whether the representation on which the creditor acted was made verbally, in writing, or by conduct (*o*). An example of this is to be found in the case of *Martyn* v. *Gray* (*p*), where A. introduced B. to C. as the moneyed partner; B. was not a partner, but he stood by, and did not deny the statement, and he was held answerable for a loss incurred. It is sometimes rather harsh, but as Eyre, C.J., said in *Waugh* v. *Carver* (*q*), it is necessary "upon principles of general policy, to prevent frauds to which creditors would be liable." But representations of this kind cannot be used against a man unless his conduct causes others to alter their condition on the faith of them.

Upon this principle, where two persons, who though not in fact partners have traded as such, become bankrupt, the assets of the business will be administered as joint estate (*r*). The executors of a deceased partner are not bound by the mere use of the old partnership name by the survivors (*s*).

A retiring member is not as such liable for debts contracted subsequently to his retirement, but he may be so if he continues an apparent member of the firm as

(*n*) *Mollwo March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C., at p. 435.
(*o*) Section 14 (1).
(*p*) (1863), 14 C. B. (N.S.) 824.
(*q*) (1793), 2 H. Bl. 235.
(*r*) *Ex parte Hayman* (1878), 8 Ch. D. 11.
(*s*) Section 14 (2).

regards persons who are not aware that he had ceased to be a partner. In order to escape liability for future transactions of the firm, he should give actual notice to persons who were in the habit of dealing with it, but a notice in the London Gazette will be sufficient as regards persons who had no dealings with the firm before the date of the dissolution or change (*t*), and it is advisable in the case of local firms to give further notice through the local papers. A dormant partner (*i.e.*, not known as a partner to the creditor seeking to enforce the debt), is not liable for debts contracted after his retirement, neither is the estate of a partner who dies (*u*).

Liability for Wrongs.—This rests on a somewhat different footing, for only those who are actual members of the firm are held liable to the consequences; and it is not involved by mere holding out (*x*). Even true partners are not answerable for all wrongs of their copartners, but only if the wrongful act was committed whilst the partner was acting with his copartner's authority, or within the ordinary course of the firm's business; or if the tort is misapplication of property, and either the money was received by the misapplying partner within the scope of his apparent authority, or was received by the firm, and misapplied whilst in its custody (*y*).

The liability—which is joint and several—rests upon the fundamental principle, that within a certain limit,

(*t*) Section 36 (1). (2).

(*u*) Section 36 (3).

(*x*) Pollock on Partnership (9th ed.), pp. 59, 60, and *Smith* v. *Bailey*, [1891] 2 Q. B. 403.

(*y*) Sections 10, 11.

dependent upon the nature of partnership business, each member of the firm is agent for the rest (*z*).

The cases decided on this point are numerous and sometimes difficult to distinguish ; some of the most important are collected by Sir F. Pollock, in his work on Partnership (*a*). The following are fair specimens, and will, for present purposes, sufficiently illustrate the rules. Two solicitors are partners, and to one of them a client hands money to be invested on a specific security ; this partner makes away with the money, and the other is entirely ignorant of the transaction ; nevertheless he is liable, for it is within the ordinary scope of a solicitor's business to receive money to invest on specific securities (*b*). Had the money been given to invest at discretion the case would have been different, such investments not being part of the solicitor's work (*c*). If a partner, being a trustee, improperly employs trust-property in the business of the firm, the other partners are not liable to replace the trust-property : provided that (i) any partner will be liable who has notice of the breach of trust ; and (ii) trust-money may be followed and recovered from the firm if still in its possession or under its control (*d*).

(ii) Rights and Duties between Partners.

When the parties enter into the contract of partnership, their rights are defined by their agreement ; this

(*z*) Section 12 ; Pollock (9th ed.), pp. 51 *et seq.*

(*a*) Pp. 48—51 (9th ed.).

(*b*) *Blair* v. *Bromley* (1847), 2 Ph. 354.

(*c*) *Harman* v. *Johnson* (1853), 22 L. J. Q. B. 297. Two more recent cases may be consulted : *Cleather* v. *Twisden* (1885), 28 Ch. D. 340 ; and *Rhodes* v. *Moules*, [1895] 1 Ch. 236.

(*d*) Section 13.

is often in writing, and partnership being a contract in connection with which good faith is deemed a main feature, the terms in which it is expressed are liberally construed. The duties and obligations arising from the relation of partnership are regulated, so far as they are touched, by any express contract; if this does not reach all those duties and obligations, they are implied and enforced by law (*e*). Of course, there may be an alteration of the terms of the partnership by consent, expressed or implied (*f*), but the consent must be unanimous.

When the partnership expires by effluxion of time, and the partners continue together, there is an implied arrangement that the partnership shall continue on the old terms so far as applicable, and the same rule applies when surviving partners continue the business after the death of a member of the old firm. Lord WATSON said: "When the members of a mercantile firm continue to trade as partners after the expiry of their original contract, without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent" (*g*). Nevertheless, if the partnership is for a fixed term, and is carried over, the new partnership will be at will only, and its continuance on the old terms will be presumed only so far as these are consistent with the incidents of a partnership at will (*h*).

(*e*) *Smith* v. *Jeyes* (1841), 4 Beav. 503.

(*f*) Section 19.

(*g*) *Neilson* v. *Mossend Iron Co.* (1886), 11 App. Cas. 298, decided on the particular words of the articles.

(*h*) Section 27.

Amongst the ordinary rights of a partner, as regards his copartners (so far as they are unmodified by agreement), are :

1. The right to take part in the business (*i*), and to have the assistance of his copartners. No remuneration can ordinarily be claimed (*k*). But compensation for extra trouble caused by the wilful inattention of a copartner to business may be allowed to the partner or partners upon whom the additional burden is thrown (*l*).

2. To have the business carried on according to agreement. Its nature cannot be changed without the unanimous consent of all the partners ; in minor matters occurring in ordinary course, a majority will bind the others (*m*).

3. To prevent the admission of a new partner. No person can be introduced as a partner without the consent of all those who, for the time being, are members of the firm (*n*). A partner may assign his share of profits, or may mortgage it ; but this may give a right to the other partners to demand a dissolution, especially if it deprives the assigning partner of all substantial interest in the concern (*o*).

Also, a partner, unless "at will," cannot retire from the firm without the consent of all : if the partnership is "at will," the partners are entitled to notice of intended retirement.

A majority of the partners cannot expel any partner unless a power to do so has been conferred by *express* agreement (*p*).

(*i*) Section 24 (6).
(*k*) Section 24 (5).
(*l*) *Airey* v. *Borham* (1861). 29 Beav. 620.
(*m*) Section 24 (8).
(*o*) Lindley, 7th ed., p. 621.
(*n*) Section 24 (7).
(*p*) Section 25.

4. To be indemnified by the firm against personal liabilities incurred and payments made by him in the ordinary and proper conduct of the business; or in or about anything necessarily done for the preservation of the business or property of the firm; *e.g.*, a partnership is formed to work a mine, and the business cannot be continued until a new shaft is sunk; a partner who pays the cost required is entitled to indemnity (*q*).

5. To have interest at the rate of five per cent. per annum on any actual payment or advance to the firm made by him beyond the capital he has agreed to subscribe, from the date of such payment or advance (*r*). Apart from agreement, express or implied, no partner is entitled to receive interest on his capital: and if there is a mere agreement to pay interest and nothing more, such interest will only be payable out of profits, *i.e.*, it will not be treated as an outgoing or loss of the business (*s*).

6. To have the books kept at the principal place of business of the firm, and to be allowed to examine and copy them whenever he may desire (*t*). The right of a partner to examine the books is not personal to himself, and he may employ an agent to whom no reasonable objection can be taken to examine the books on his behalf: but the agent must undertake not to make use of the information so acquired except for the purpose of advising his principal (*u*).

(*q*) Section 24 (2), and *Ex parte Chippendale* (1853), 4 De G. M. & G. 36.

(*r*) Section 24 (3).

(*s*) Section 24 (4).

(*t*) Section 24 (9).

(*u*) *Beran* v. *Webb*, [1901] 2 Ch. 59.

7. In the absence of any special agreement, the partners are entitled to share equally in the capital and profits of the business, and must contribute to the losses equally (*x*).

8. To be dealt with by his colleagues with the utmost good faith in all partnership matters.

Every partner must account to the firm for any benefit he may derive which is obtained by him (without the assent of the others) through a partnership transaction (*y*), *e.g.*, A., B., C., and D. are partners in business as sugar refiners, A. being also in trade for himself as a sugar merchant, the other partners being cognizant, and not objecting; A., without the knowledge of the firm, sells sugar at a profit to it:—*Held*, he must account for and share this profit with the partnership (*z*). A partner who carries on a *competing* business without the consent of the others, must account for and pay over to the firm all profits made by him therein (*a*). In short, partners must act for the common advantage of all in any matter which affects the affairs of the partnership, and may hide nothing from each other which may be material to their relations as a firm (*b*).

The same duty governs the sale by one partner to another of a share in the partnership business. If, in such a transaction the purchaser knows, and is aware that he knows, more about the partnership accounts than the vendor, he must put the vendor in possession of all material facts and not conceal what he alone

(*x*) Section 24 (1). (*y*) Section 29.

(*z*) *Bentley* v. *Craven* (1853), 18 Beav. 75; and see *Featherstonehaugh* v. *Fenwick* (1810), 17 Ves. 298.

(*a*) Section 30.

(*b*) Section 28.

knows; and unless such information is furnished the sale may be set aside (*e*).

After Dissolution.—When the partnership is put an end to, new rights accrue to its members:

1. A public notification of the dissolution may be demanded by any partner, and, as the practice of the Gazette Office is to require the signature of all the partners, any one may take action to compel a recalcitrant member to sign (*d*).

2. Each partner has an equitable lien on the property owned by the firm at the date of dissolution, entitling him to have it applied in payment of the firm's debts, and then in payment of what may be due to the partners (*e*). If a partner has been induced to enter the partnership by fraud or misrepresentation, and has, on that ground, obtained rescission of the partnership contract, he will be entitled to repayment of the amount given by him for his share, after the partnership liabilities have been satisfied; and to secure payment of that amount he has a lien on the surplus assets (*f*).

3. In settling the accounts between the partners after a dissolution, *subject to any agreement*, the assets of the firm (including sums contributed by partners to make up deficiencies of capital) must be distributed in the following order: (1) In paying liabilities of the firm to persons who are not partners; (2) in paying

(*e*) *Law* v. *Law*, [1905] 1 Ch. 140.

(*d*) Section 37.

(*e*) Section 39. The right of a partner to have the goodwill sold when the firm has been dissolved is referred to *post*, p. 179.

(*f*) Section 41. He is also entitled to stand in the place of creditors for any payment made by him in respect of partnership liabilities, and is entitled to be indemnified by the person guilty of the fraud against all the debts and liabilities of the firm (*ibid.*).

partners rateably what is due from the firm to them for advances as distinguished from capital ; (3) in paying each partner rateably what is due from the firm to him in respect of capital ; (4) in distributing the ultimate residue among the partners in the proportion in which profits are divisible (*g*). Losses (including deficiencies of capital) must be paid first out of profits : next out of capital ; if this is exhausted, then individually by the partners, in the same proportions as the profits would have been divided had any existed (*g*).

Where partners have contributed unequal capitals and have agreed to share profits and losses equally, if there is a loss of capital and one of the partners is unable to contribute his share of the loss, the solvent partners are not bound to contribute for him. Thus, in *Garner* v. *Murray* (*i*), G., M., and W. became partners on the terms that they should contribute the capital in unequal shares and divide the profits equally. On a dissolution, after satisfying all liabilities to creditors and the advances of the partners, the assets were insufficient to make good the capital. A larger sum was due to G. than to M. Nothing could be recovered from W. :—*Held*, that the true principle of division was for each partner to be treated as liable to contribute an equal third share of the deficiency, and then to apply the assets in paying to each partner rateably what was due to him in respect of capital.

4. Any partner may, on dissolution, require that the property, including the goodwill (*k*), shall be sold, and he may restrain any other partner from doing anything

(*g*) Section 44.
(*i*) [1904] 1 Ch. 57.
(*k*) See *post*, pp. 191—193.

tending directly to decrease the value, *e.g.*, using the firm's name, when an attempt is being made to sell the goodwill. And the goodwill may be sold when a partner dies, for the right to it does not vest in the survivors (*l*).

5. When one partner on entering on a partnership for a fixed term pays a premium, and before the expiration of the term the firm is dissolved, the court may order a return of all or of a certain amount of this premium, but not when the dissolution is wholly or chiefly due to the misconduct of the partner who paid the premium, nor when the firm has been dissolved by an agreement containing no provision for a return of any part of the premium (*m*). The entire question is in each case in the discretion of the court, and such order will be made as, under the circumstances, will work justice. In *Atwood* v. *Maude* (*n*), one partner took another into business with him, asking a premium as compensation for the latter's inexperience. Within two years the original partner demanded a dissolution on the ground of the latter's incompetence, whereupon the new partner sued the original partner for a dissolution and a return of the premium, and the court awarded dissolution and a return to the former of such part of the premium as bore the same proportion to the total amount as the two years did to the total term agreed upon. From this judgment it appears that the court will ordinarily order the return of the premium, having regard to the terms of the contract, the position of the parties, and their conduct, and that the amount

(*l*) *Smith* v. *Everett* (1859), 27 Beav. 446.
(*m*) Section 40. (*n*) (1868), L. R. 3 Ch. 369.

will be calculated on a proportion similar to that taken in the case mentioned.

6. When a member of a firm ceases to be a partner, he is entitled to a settlement in due course, and the amount due is deemed to be a debt accruing due at the date of the dissolution or retirement, unless otherwise agreed (*o*). If the continuing or surviving partners trade with this money, the outgoing partner or his estate is, in the absence of agreement to the contrary, entitled to such share of the profits made since the dissolution as the court may find to be attributable to the use of the outgoing partner's money, or, at the option of the outgoing partner or his representatives, to interest at the rate of five per cent. per annum (*p*). It is advisable to provide for such an event in the articles of partnership, and to fix in them the basis upon which an outgoing partner's share or his rights in the goodwill are to be valued.

Authority of a Partner.

It is quite settled that all partners are bound by the acts or admissions of one, if done within the scope of the business. Story says, "a partner, indeed, virtually embraces the character both of a principal and agent" (*q*). And in *Baird's Case* (*r*), James, L.J., said, "as between the partners and the outside world (whatever may be their private relations between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership

(*o*) Section 43.
(*p*) Section 42.
(*q*) Partnership, § 1.
(*r*) (1870), L. R. 5 Ch., at p. 733.

business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership."

But a partner is an agent only so far as he is acting upon, and within the scope of, the firm's ordinary affairs; that the act is useful to the firm is not sufficient, neither is it necessary; the act done must be a furtherance of the ordinary business of the firm; and even then (as has already been pointed out), the firm will not always be bound, for if a partner attempts to make a firm liable, though within his apparent authority, the firm will not be bound, if in fact he has no authority, and if this was known to the other contracting party, or by the exercise of reasonable diligence could have been known; *e.g.*, a partner gives a partnership security in discharge of a private debt; the recipient must show that he took it without knowledge, and without such negligence as would amount to knowledge; and COCKBURN, C.J., said in one case, that in a case such as this, the recipient would deal with the partner at his peril (*s*).

Sir F. Pollock (*t*) deals with certain of the more ordinary transactions, thus:

Every partner may bind his firm by any of the following acts:

(a) He may sell any goods or personal chattels of the firm;

[Legal estate in land must be conveyed by all the partners, or by one authorised by *deed*.]

(*s*) *Kendal* v. *Wood* (1871), L. R. 6 Ex. 243; and see Pollock on Partnership (9th ed.), pp. 39, 40.

(*t*) Pollock (9th ed.), pp. 31, 32.

(b) He may purchase on account of the firm any goods of a kind necessary for or usually employed in the business carried on by it ;

(c) He may receive payment of debts due to the firm, and give receipts and releases for them (*u*) ;

(d) He may engage servants for the partnership business.

If the partnership is in trade, every partner may also bind the firm by any of the following acts :

(e) He may make, accept, and issue bills and other negotiable instruments in the name of the firm (*x*) ;

[A member of a *non-trading* partnership may bind the firm by negotiable instruments, but only in those cases where it is shown to be within the usual course to issue negotiable instruments, the burden of showing this being on the person attempting to make the firm liable.]

(f) He may borrow money on the credit of the firm ;

(g) He may, for that purpose, pledge any goods or personal chattels belonging to the firm.

A partner has no implied authority to bind the firm by a deed (*y*), or to give a guarantee in the name

(*u*) In the absence of express or implied authority, a private debt due to one partner is not discharged by payment to the firm of which he is a member (*Powell* v. *Brodhurst*, [1901] 2 Ch. 160).

(*x*) When a partner's individual name coincides with the firm's name, and he does not carry on a separate business, his acceptance of a bill of exchange is primâ facie the acceptance of the firm. See *Yorkshire Banking Co.* v. *Beatson* (1880), 5 C. P. D. 109.

(*y*) *Steiglitz* v. *Eggington* (1815), Holt N. P. 141.

of the firm (*z*), or to bind the firm by a submission to arbitration (*a*).

The authority continues even after a dissolution, so far as is necessary to properly wind up the business and complete pending transactions, save that a bankrupt partner cannot bind the firm by his acts (*b*). And where one of two partners dies, the surviving partner may carry on the business for the purpose of finally winding it up, and may mortgage the real or personal property of the late firm for the purpose of securing a partnership debt (*c*).

PROPERTY OF THE FIRM.

The assets which are to make up the property of the firm should be defined as fully as possible in the articles of partnership. Unless otherwise agreed, all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, is partnership property, and must be held and applied by the partners exclusively for the purpose of the partnership and in accordance with the partnership agreement (*d*); and property bought with the money of the firm is deemed, unless a contrary intention appears, to be partnership property (*e*).

During the continuance of the firm, the members are joint-owners of the property; *i.e.*, each owns the whole,

(*z*) *Brettel* v. *Williams* (1849), 4 Exch. 623.
(*a*) *Stead* v. *Salt* (1825), 3 Bing. 101.
(*b*) Section 38.
(*c*) *In re Bourne*, [1906] 2 Ch. 427.
(*d*) Section 20 (1).
(*e*) Section 21.

and the property is not divided up into portions which belong separately to the members. In ordinary cases of joint-ownership, when one joint-owner dies, his co-owners succeed to his share: but in the joint-ownership arising out of partnership this is not so (*f*), and the representative of the deceased succeeds to his interest. It should be observed that partnership property, whatever be its nature, is, as between the partners, looked upon as personalty, and, therefore, on death, the personal representative is the one entitled; but this may be modified by agreement between the partners (*g*).

Claims of one partner against the other are subject to the Statute of Limitations, and the time runs from the date of dissolution of the partnership, or from the date when one partner is improperly excluded by the others from acting as partner (*h*).

A partner's share is the proportion of the partnership assets after they have all been realised and converted into money, and all the debts and liabilities have been paid and discharged.

A partner who assigns his share of the property to another person, either absolutely or by way of mortgage, gives, according to the terms of the assignment, the assignee the right to receive, in whole or in part, the share of profits and (on dissolution) of the property which would have come to that partner; but the assignee cannot during the continuance of the

(*f*) "*Jus accrescendi inter mercatores locum non habet.*"

(*g*) Section 22.

(*h*) 19 & 20 Vict. c. 97, s. 9; *Knox* v. *Gye* (1872), L. R. 5 H. L. 656; Lindley on Partnership (7th ed.), pp. 551 *et seq.*

partnership, inspect the firm's books or interfere in the business (*i*).

The assignee cannot complain of a bonâ fide agreement subsequent to the assignment to pay salaries to the partners even though this may diminish the profits (*k*) ; he must also accept the account of profits agreed to by the partners, but on a dissolution he is entitled to have an account taken for the purpose of ascertaining the value of the share assigned, irrespective of any agreement between the partners themselves as to the value of such share (*l*).

DISSOLUTION.

The rights and duties consequent upon dissolution have already been considered ; it now remains to show how, when, and on what grounds it is brought about. It may be caused in any of the following ways :

1. At the will of a partner where no fixed term has been agreed upon (*m*). If the partnership was constituted by deed, the partner desiring to terminate the partnership must give notice in writing ; in other cases verbal notice will suffice (*n*). But a partnership where no fixed term has been agreed upon, or a partnership entered into for an undefined time, may not be a partnership at will, if the partners have made an agreement to the contrary, *e.g.*, that the partnership should be terminated "by mutual arrangement only" (*o*).

(*i*) Section 31.
(*k*) *Re Garwood's Trusts*, [1903] 1 Ch. 236.
(*l*) *Watts* v. *Driscoll*, [1901] 1 Ch. 294.
(*m*) Sections 26 (1), 32 (c).
(*n*) Section 26 (2).
(*o*) *Moss* v. *Elphick*, [1910] 1 K. B. 846.

2. By effluxion of the time agreed upon as the term, or if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking (*p*).

3. Transfer of a partner's interest—

(a) By bankruptcy or death, unless otherwise agreed (*q*) ;

(b) At the option of the other partners, if any partner suffers his share to be charged by the court for his private debts on the application of any of his creditors (*r*).

4. Occurrence of an event making the partnership illegal (*s*) ; *e.g.*, war breaking out between the countries of which the different members of the partnership are subjects ;

5. Fraud, making the original contract voidable ;

6. In addition, the *court* may decree a dissolution of partnership in any of the following cases :

(i) Lunacy or permanent insanity of a partner (*t*);

(ii) Permanent incapacity of a partner to perform his part of the contract (*u*) ;

(iii) Misconduct of a partner calculated to prejudice the business, or persistent breach of the agree-

(*p*) Section 32 (a), (b).

(*q*) Section 33 (1).

(*r*) Section 33 (2). Under s. 23 of the Act, a judgment creditor of any partner may obtain from the court an order charging the share of the partner in the partnership property with the payment of the debt, and may obtain the appointment of a receiver of that partner's share of profits and other moneys coming to him in respect of the partnership. The other partners may redeem the interest charged, or if a sale is directed, may buy it. A writ of execution cannot issue against any partnership property save on a judgment against the firm ; hence the necessity for this procedure.

(*s*) Section 34.

(*t*) Section 35 (a).

(*u*) Section 35 (b).

ment, or such other conduct as makes it not reasonably practicable for the other members to continue in partnership with him (*x*) ;

(iv) When the business can only be carried on at a loss (*y*) ;

(v) Whenever the court thinks it just and equitable to decree dissolution (*z*).

In the cases of permanent incapacity, misconduct and persistent breach of agreement, a partnership cannot be dissolved on the application of the partner who is in fault, but a partnership may be dissolved on behalf of a partner who has become insane, as well as at the instance of the other members.

ADMINISTRATION OF PARTNERSHIP ESTATE.

The following rules apply to the administration of the estate of bankrupt and insolvent partners. The partnership property is termed the *joint estate*, and the separate properties of the individual partners the *separate estates*.

The rule is that joint estate is applied in payment of the debts of the partnership, and separate estate in payment of the individual debts of the partner to whom it belongs ; if in either case any surplus remains, this is carried over to pay the deficit in the other class, the joint estate surplus going to the separate estates in proportion to the right and interest of each partner in the joint estate. Thus A. and B. are partners ; A. owes his separate creditors £100. and his separate estate is £75. B. owes £150. and has £175 ; the firm's debts

(*x*) Section 35 (c), (d).
(*y*) Section 35 (e).
(*z*) Section 35 (f).

are £500, and assets £450. The private creditors of A. take the £75, those of B. take £150 of the £175, the joint creditors taking the remaining £25. Again, if A. and B. are partners, and A. is insolvent, B. being solvent, the joint creditors will recover the full amount from B., B. being then allowed to prove against A.'s estate to the amount which he has paid beyond his proportion.

Similar principles hold in the administration of the estate of a deceased partner in the Chancery Division.

This rule, which has been much criticised, is firmly established. Thus, in *Ex parte Morley* (*a*), JAMES, L.J., says, "if there be two estates, a joint estate and separate estate, the court takes care that the joint assets are applied in payment of the debts of the joint creditors, before any part of them goes to the separate creditors"; and in *Lacey* v. *Hill* (*b*), he says, "as a general rule, a separate estate cannot prove against a joint estate, and a joint estate cannot prove against a separate estate, till the creditors of the respective estates sought to be proved against are satisfied." So, in *Rolfe* v. *Flower & Co.* (*c*), Lord CHELMSFORD, in delivering the judgment of the Privy Council, said "Upon a joint bankruptcy or insolvency the joint estate is the fund primarily liable, and . . . the separate estate is only brought in, in case of a surplus remaining after the separate creditors have been satisfied out of it." And see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40, which adopts the rule for bankruptcy purposes.

(*a*) (1873), L. R. 8 Ch. 1026, 1032.
(*b*) (1873), L. R. 8 Ch. 441, 444.
(*c*) (1866), L. R. 1 P. C. 27, 48.

But the law here, as elsewhere, recognises exceptions when there has been fraud. Thus, when a partner has fraudulently, and without the consent of the others, converted partnership property to his own use, the joint estate may prove against that partner's separate estate, even though it is not shown that the separate estate has benefited by the conversion (*d*). As regards the fraudulent conversion, "it is not necessary for the joint estate to prove more than . . . that this over-drawing was for private purposes, and without the knowledge, consent, privity, or subsequent approbation of the other partners. If that is shown, it is primâ facie a fraudulent appropriation within the rule" (*e*). And such consent or knowledge must have been real, not constructive, for it is the better opinion that the doctrine of constructive notice is not applicable here (*f*).

On similar principles it has been decided that a creditor of the firm whose debt was incurred by the perpetration of a fraud by the partners, or any of them, may prove his debt at his election against either the joint estate or the separate estates of the fraudulent partners (*g*).

And if there be no joint estate and no solvent partner who can be sued, the joint creditors may prove against the separate estates on an equal footing with the separate creditors (*h*).

(*d*) See *Read* v. *Bailey* (1878), 3 App. Cas. 94.

(*e*) JESSEL, M.R., in *Lacey* v. *Hill* (1877), 4 Ch. D. 543.

(*f*) See *Lacey* v. *Hill*, *supra*, and Pollock (9th ed.), pp. 169 *et seq.*

(*g*) *Ex parte Adamson* (1878), 8 Ch. D. 807; possibly against the estate of an innocent partner (*Ex parte Salting* (1884), 25 Ch. D. 148).

(*h*) *Re Budgett*, [1894] 2 Ch. 557.

Partners may not compete in an administration with the firm's creditors, either against the joint or against any of the separate estates, unless the separate property of a partner has been converted to the use of the firm, or vice versâ, and unless this conversion has taken place fraudulently.

A creditor of the firm who holds a security for the debt on the separate property of a partner may prove against the joint estate and retain his security against the separate estate, provided he does not receive in the whole more than the full amount of his debt. And a private creditor of a partner holding a security on the joint property is in a corresponding position. The reason of the above rule is that the surrender of the security would not augment the estate against which proof was being made (*i*).

GOODWILL.

The nature of goodwill is so intimately connected with the law of partnership, and questions concerning it arise so frequently in partnership matters, that it may be very properly discussed in this place.

The term is one which is seldom misunderstood, but it is not easy to give a definition of it. Lord MACNAGHTEN, in *Trego* v. *Hunt* (*k*), says: "What 'goodwill' means must depend on the nature and character of the business to which it is attached. Generally speaking, it means much more than what Lord ELDON took it to mean in the particular case

(*i*) *In re Turner* (1882), 19 Ch. D. 105.

(*k*) [1896] A. C., at pp. 23, 24. See also *per* WARRINGTON, J., in *Hill* v. *Fearis*, [1905] 1 Ch., at p. 471.

actually before him of *Cruttwell* v. *Lye* (*l*), where he says: 'The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place.' Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money.'"

In some forms of business, the goodwill is personal (*m*), *e.g.*, made by the skill of the person owning it: whilst in others, the goodwill attaches itself rather to the property than to the owner's person, *e.g.*, the goodwill of a well-situated publichouse (*n*). Some businesses depend so entirely upon personal skill and influence, that goodwill of them can with difficulty exist, *e.g.*, a solicitor's business (*o*). A personal goodwill is capable of transfer, and so is the other kind, and this latter attaches itself to the property, and may go with it, *e.g.*, to a mortgagee (*p*).

The question which has given the greatest trouble to the courts is to what extent the assignor of the goodwill is bound not to enter into competition with the old firm. In *Churton* v. *Douglas* (*q*), it was said that the vendor could carry on the same class of business,

(*l*) (1810), 17 Ves. 346.

(*m*) *Cooper* v. *Metropolitan Board of Works* (1884), 25 Ch. D. 472.

(*n*) *Ex parte Punnett* (1881), 16 Ch. D. 226.

(*o*) *Austen* v. *Boys* (1858), 27 L. J. Ch. 714; *Arundell* v. *Bell* (1883), 31 W. R. 477: but BAGGALLAY, L.J., thought that something might exist analogous to a goodwill.

(*p*) *Cooper* v. *Metropolitan Board of Works*, *supra*; *cf. In re Bennett*, [1899] 1 Ch. 316.

(*q*) (1859), Johns. 174.

and with the same customers, provided that he did not represent to them that his was the old business, or that he had succeeded to that old business; but in *Labouchere* v. *Dawson* (*r*), it was decided that upon the sale of a goodwill, the vendor must not solicit the old customers to cease dealing with the purchaser; although he may deal with such persons if they come to him unsolicited (*s*).

The present state of the law may be summed up thus (*t*):

(a) The person who acquires the goodwill alone may represent himself as continuing or succeeding to the business of the vendor.

(b) But the assignor may nevertheless carry on a similar business in competition with the purchaser, though not under a name which would amount to a representation that he was carrying on the old business.

(c) The assignor may publicly advertise his business, but he may not personally or by circular solicit the customers of the former firm (*u*); and although he may deal with customers of the old firm, he must not *solicit* those who come to him of their own accord (*x*).

The way in which the goodwill should be dealt with on the dissolution of a firm has already been mentioned (*y*).

(*r*) (1872), L. R. 13 Eq. 322.

(*s*) *Leggott* v. *Barrett* (1880), 15 Ch. D. 306.

(*t*) *Trego* v. *Hunt*, [1896] A. C. 7.

(*u*) The rule against the solicitation of old customers does not apply to an involuntary alienation, *e.g.*, to the sale of a person's business by his trustee in bankruptcy (*Walker* v. *Mottram* (1882), 19 Ch. D. 355).

(*x*) *Curl Brothers, Limited* v. *Webster*, [1904] 1 Ch. 685.

(*y*) *Ante*, p. 179.

LIMITED PARTNERSHIPS.

After January 1st, 1908, it became lawful to form limited partnerships under the Limited Partnerships Act, 1907 (*z*). Such a partnership must not consist of more than ten persons in the case of a banking firm, or of more than twenty persons in any other case. It must consist of one or more *general* partners, liable for all the debts and obligations of the firm and one or more *limited* partners, who shall at the time of entering into partnership contribute a sum as capital, or property valued at a stated amount. A limited partner is not liable for debts beyond the amount so contributed, but he must not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so he will be liable for the debts of the firm up to the amount so drawn out or received back. A body corporate may be a limited partner (*a*). Unless a limited partnership is registered, every limited partner will be liable as a general partner (*b*). A limited partner must not take any part in the management of the business, and he cannot bind the firm, but he may inspect the books, examine into the state and prospects of the business, and advise with the partners thereon. If a limited partner does take part in the management of the business he will be liable as a general partner for debts incurred while he so takes part in the management. The death or bankruptcy of a limited partner does not dissolve the partnership, and the lunacy of a limited partner is only a ground for dissolution if

(*z*) 7 Edw. 7, c. 24.
(*a*) *Ibid.*, s. 4. (*b*) *Ibid.*, s. 5.

his share cannot be otherwise ascertained and realised. On dissolution the right to wind up the affairs of the partnership is vested in the general partners, unless the court otherwise orders, and the court may wind up these partnerships under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) (*c*). The law as to private partnerships applies where it is not inconsistent with the provisions of the Act (*d*).

On registration particulars must be furnished containing the firm name; the general nature of the business; the principal place of business; the full name of each partner; the term, if any, for which the partnership is entered into, and the date of its commencement; a statement that the partnership is limited, and the description of every limited partner as such; the sum contributed by each limited partner, and whether paid in cash or how otherwise (*e*). Changes in any of the above matters must be registered from time to time (*f*). Any arrangement under which a general partner becomes a limited partner, or a limited partner assigns his share to another person, must be advertised in the London, Edinburgh, or Dublin Gazette, before it becomes effective (*g*). The statements made under the Act are filed by the registrar, and are open to the inspection of any person on payment of a small fee (*h*).

(*c*) *Ibid.*, s. 6.
(*d*) *Ibid.*, s. 7.
(*e*) *Ibid.*, s. 8.
(*f*) *Ibid.*, s. 9.
(*g*) *Ibid.*, s. 10.
(*h*) *Ibid.*, ss. 13, 16.

COMPANIES.

The whole law dealing with companies has been recently codified, and it is not therefore necessary to deal with previous enactments on the subject.

The only Act now in force is the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and the sections referred to throughout the present chapter are, unless otherwise stated, sections of that Act.

It is proposed to deal with a company—

(A) As a going concern.

(B) In liquidation.

(A) THE COMPANY AS A GOING CONCERN.

The Formation of a Company.

A partnership cannot consist of more than twenty persons, or, in the case of a banking business, of more than ten persons; beyond this number it must be registered as a company (*a*). Only seven persons are needed to form a company (or in the case of a "private" company under the Act, two persons). A company can be formed, having the liability of members limited to the amount of their shares, or limited to such amount as the members undertake to guarantee in the event of the company being wound up; or with no limit on their liability.

These are called respectively a company "limited by shares," a company "limited by guarantee," and an

(*a*) Section 1.

"unlimited" company. In the present chapter it is only proposed to deal with companies limited by shares.

Let us suppose that seven persons have decided to form such a company. The object has been already agreed. It remains to settle the name of the company, the place where the business is to be carried on, the amount of each share, and the amount of funds necessary to carry on the business. The points are embodied in a document known as the "Memorandum of Association," which is signed by the seven persons, who must agree to take one or more shares in the company (*b*). This document is then taken to the Registrar of Companies at Somerset House, where a fee is paid. The registrar enters the new company on the register, grants a certificate of incorporation, and the company is complete.

(i) The Memorandum of Association.

There are six essential clauses in the memorandum of association, as follows (*c*):

The Name.—Any name may be chosen, so long as it does not resemble the name of some other firm or company (*d*). The last word of the name must be "limited" (*e*). A company may change its name by special resolution with the consent of the Board of

(*b*) Section 3.

(*c*) *Société Panhard et Levassor* v. *Panhard Levassor Motor Co., Limited*, [1901] 2 Ch. 513.

(*d*) Except in the case of companies formed to promote art, science, etc. (ss. 19, 20).

(*e*) Section 258.

Trade (*f*); but if it has inadvertently registered a name similar to that of an existing company, the consent of the registrar is sufficient.

The Registered Office.—The company must have a registered office, and the memorandum must state whether the office is in England, Scotland or Ireland (*g*). There the register of members and notices on the company must be served.

The Objects of the Company.—The company cannot do anything outside the powers given in the memorandum (*h*). The company may, however, do anything that is "fairly incidental" to the powers of the company (*i*). If, however, the main object of the company is gone, the company must be wound up (*k*). There is no limit to the objects for which a company may be formed except that it must not be illegal. The company may alter its memorandum by special resolution confirmed by the court, so as to enable it (*l*)—

(a) to carry on its business more economically or efficiently; or

(b) to attain its main purpose by new or improved means; or

(c) to enlarge or change the local area of its operations; or

(*f*) Section 8 (3).

(*g*) Section 62.

(*h*) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653, 672.

(*i*) *Foster* v. *London, Chatham and Dover Rail. Co.*, [1895] 1 Q. B. 711.

(*k*) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600.

(*l*) Section 9.

(d) to carry on some other business which may be conveniently combined with its own ; or
(e) to restrict or abandon any of its objects.

Limited Liability.—The members' liability may be limited by shares or by guarantee (see *ante*, p. 196). In either case the fact must be stated in the memorandum, but a bare statement that the liability is "limited" is taken to mean "limited by shares."

The Share Capital.—This clause must state the share capital with which the company proposes to be registered, and the number and amount of the shares. Money borrowed by means of debentures is not part of the company's capital. A preference given to one class of shares is sometimes stated in the memorandum for the protection of the preferred shareholders, but this is not essential.

The Association Clause.—This is found at the end of the memorandum. It runs : "We . . . are desirous of being formed into a company . . . and agree to take the number of shares opposite our names." Then follow the names, addresses and descriptions of the seven subscribers, and the number of shares taken by each of them. Each must take at least one share. Anyone may subscribe, whether married woman, infant or foreigner.

The seven signatures must be attested by at least one witness. The duties of the subscribers are :

(1) To pay for their shares.
(2) To sign the articles of association.
(3) To appoint the first directors.
(4) Unless the articles provide otherwise to act as the first directors until such appointment.

(ii) Articles of Association.

While the memorandum of association defines the powers of the company in its dealings with the outer world, the articles of association are the regulations which govern the relations of the company and the members *inter se*; they deal with the internal administration of the company. In the case of both memorandum and articles the company and the members are bound to the same extent as if they had been signed and sealed by each member, and contained covenants by each member to observe them (*m*): and any alteration therein, if properly made, is equally binding (*n*).

It is not essential for articles of association to be registered. If no articles are registered, the regulations in Table A. in the First Schedule to the Companies Act form the company's articles of association. The regulations of Table A. apply in the case of a company whose articles are registered only in so far as the regulations in Table A. are not excluded (*o*).

The articles are subject to the memorandum, and the power to alter the articles cannot be used by the company to alter anything in the memorandum (*p*). For purposes of construction, however, the memorandum and articles are to be read together, as the one may explain the other (*q*).

Alteration of the Articles.—A company may alter its articles by special resolution (*r*). Any alteration may

(*m*) Section 14. (*n*) Section 13. (*o*) Section 11.

(*p*) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653.

(*q*) *London Financial Association* v. *Kelke* (1884), 26 Ch. D. 107.

(*r*) Section 13. As to special resolution, see *post*, p. 217.

be made which does not go outside the powers of the memorandum (*s*), or deal unfairly with the rights of the minority. In the latter case, however, if the alteration is made bonâ fide for the benefit of the company as a whole, it will be allowed (*t*).

Registration of Memorandum and Articles.—This is effected with the Registrar of Companies at Somerset House. Anyone may inspect the memorandum and articles on payment of a shilling, but only members of the company are entitled to have a copy. Persons dealing with the company are deemed to have notice of their contents, and must act accordingly: but they are only bound to see that the proposed dealing is not inconsistent with the memorandum and articles; they need not inquire whether all the necessary steps have been taken by the company itself to make the proceedings regular (*u*).

(iii) The Prospectus.

This is usually signed by a person who is called the "promoter." The term is not defined in the Act, but COCKBURN, C.J., defined a promoter as "one who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose" (*v*). In issuing the prospectus the promoter must take care not to make any untrue statements, otherwise—

(*s*) *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361.
(*t*) *Allen* v. *Gold Reefs Co.*, [1900] 1 Ch. 656.
(*u*) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327.
(*v*) *Mycross* v. *Grant* (1877), 2 C.P. D., at p. 541.

(1) An allotment of shares may be set aside on the ground of misrepresentation ;

(2) He may have to pay damages (a) for fraud (*w*), and (b) for statements which he believed to be true without reasonable ground for such belief (*x*).

The promoter must also disclose all matters in the prospectus required to be disclosed by the Companies (Consolidation) Act, 1908 (*y*). Every prospectus must be dated, a copy must be signed by every director and filed with the registrar ; every prospectus must state that a copy has been so filed.

The prospectus must state—

(a) The contents of the memorandum, and the number of "founders'" or deferred shares, if any ;

(b) The number of shares (if any) fixed by the articles as the qualification of a director, and the remuneration of the directors as fixed by the articles ;

(c) The names, descriptions, and addresses of the directors ;

(d) The minimum subscription on which the directors may proceed to allotment ;

(e) The number of shares or debentures issued as fully or partly paid up otherwise than for cash ;

(f) The names and addresses of the vendors and the amount payable to each ;

(g) The amount of the purchase money, specifying the amount payable for goodwill ;

(*w*) *Derry* v. *Peek* (1889), 14 App. Cas. 337. See *ante*, pp. 91 *et seq.*

(*x*) Section 84. See *ante*, pp. 100, 101.

(*y*) Section 81.

(h) The amount of underwriting commission, if any (*z*) ;

(i) The amount of preliminary expenses ;

(j) The amount paid to any promoter and the consideration therefor ;

(k) The date of and parties to every material contract and a reasonable time and place where the contract or a copy thereof may be inspected (*a*) ;

(l) The names and addresses of the auditors (if any) ;

(m) The interest of every director in the promotion of, or in the property to be acquired by, the company, and the sums paid him to induce him to become a director ;

(n) Where the shares are of more than one class, the right of voting conferred by the several classes of shares.

Some of these particulars are excused where the prospectus is not issued until a year after the company is entitled to commence business. Where no prospectus is issued the company must file with the registrar a "statement in lieu of prospectus" containing most of the information which would be required in the prospectus (*b*). If the proper particulars are not given in the prospectus, the company and every person who

(*z*) By s. 89 underwriting (*i.e.*, the payment of commission to a person agreeing to subscribe for shares) is allowed only if (1) the payment is authorised in the articles, (2) the payment does not exceed the rate authorised, (3) the amount or rate is disclosed in the prospectus.

(*a*) The company cannot contract before it comes into existence, even by means of an agent (*Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174). If it is sought to enter into such an agreement, it must always be confirmed by a new contract after the incorporation of the company.

(*b*) Section 82.

is knowingly a party to the issue is liable to a fine of £5 per diem. But it is an excuse if the director or other person did not know of the matter disclosed, or if non-compliance arose from an honest mistake of fact on his part (*c*).

Foreign Companies.—Companies formerly sought to evade these provisions as to disclosure of particulars by being registered outside the United Kingdom. Now, however, such a company, if it establishes a place of business within the United Kingdom, must within one month of so doing, file with the registrar a copy of its articles and memorandum, a list of its directors, and certain other particulars. Such a company must also state in its prospectus (if any) and exhibit on its premises the name of the country where the company was incorporated (*d*).

A company incorporated in a British possession, if it complies with these requirements, has power to hold land in this country as if it were an English company (*e*).

Shareholders and Shares.

Persons may become members (*f*)—

(a) By signing the memorandum of association ;

(b) By allotment, or by taking a transfer of shares from a member (*g*) ;

Capacity. — Anyone can become a member, *e.g.*, another company, a married woman, or an infant ; but an infant has the right to repudiate the shares on

(*c*) Section 81.
(*d*) Section 274.
(*e*) Section 275.
(*f*) Section 24 (1).
(*g*) *Ibid.*, sub-s. (2).

attaining full age (*h*). A shareholder must pay the whole nominal amount of his shares in cash. In other words, the company cannot issue shares at a discount. Shares may be issued in return for services. If this is done, the company must file with the registrar a contract in writing showing the consideration of the allotment, and the number and amount of the shares allotted (*i*).

A register of members is required to be kept at the registered office of the company, open to inspection by members free of charge, and to others on payment of one shilling (*k*).

If shares are held on trust, the trustee's name is entered on the register, and the company need take no notice of the trust (*l*).

On the death of a shareholder his executor is not personally liable to pay calls, unless he applies to be put on the register; he is then entitled to an indemnity from the estate.

Annual Summary (*m*).—Every year the company must send to the registrar a list of its members and "the annual summary," which must contain the following particulars—

(1) The amount of the share capital and the number of shares;

(2) The number of shares taken since the commencement of the company;

(3) The amount called up on each share;

(*h*) *Hamilton* v. *Vaughan-Sherrin Co.*, [1894] 3 Ch. 589. See *ante*, pp. 34, 38.

(*i*) Section 88 (1) (b).

(*k*) Section 30. (*l*) Section 27.

(*m*) Section 26. This statement must be sent in within twenty-one days after the general meeting.

(4) The amount of calls received and unpaid, and shares forfeited ;

(5) The amount paid by way of commission in respect of shares and debentures since the last return ;

(6) The number of share warrants, and the number of shares comprised in them ;

(7) A list of the directors ;

(8) The amount of debts due from the company in respect of mortgages and charges ;

(9) An audited balance-sheet, showing the company's capital, liabilities, and assets.

A share entitles the holder to a proportion of the profits of the company, and of its capital when it is wound up.

Allotment.—No shares are to be allotted until the minimum subscription has been subscribed and the sum payable on application paid (*n*). The minimum subscription is fixed by the articles and named in the prospectus, and the sum payable on application must not be less than 5 per cent. of the nominal amount of the shares. If the minimum subscription is not subscribed within forty days after the issue of the prospectus, all money received from applicants for shares must be repaid within eight days. If no minimum subscription has been fixed and named, then the whole amount of the share capital offered must be subscribed before allotment is made. These provisions as to a minimum subscription only apply to the first allotment of shares offered to the public for subscription ; but the amount payable on application must

(*n*) Section 85.

never be less than 5 per cent. of the nominal amount of the shares.

Share Certificate (*o*).—The company must issue to the shareholders a share certificate within two months after allotment or the registration of a transfer. This enables the shareholder at once to show a primâ facie title to the shares included in it.

Transfer.—Every shareholder has a right to transfer his shares even if not fully paid provided that he transfers them absolutely (*p*). But the directors may be given a discretion to refuse a transfer without assigning a reason ; this, however, is not allowed by the rules of the Stock Exchange.

On the death of a shareholder, his shares vest in his personal representatives ; on his bankruptcy, in his trustee.

Forfeiture.—The articles usually give the directors power to declare shares forfeited if the shareholder does not pay calls upon them. The shares then belong to the company, and may be sold for the best price obtainable. Sometimes the directors are given power to accept the surrender of the shares, but this is only permissible where a forfeiture would be justified (*q*).

Preference Shares.—The holder of these shares is usually entitled by the articles to a fixed dividend before any dividend is paid on the ordinary shares. If the preference is meant to extend to capital as well as dividend, provision to that effect should be made in the articles of association. Preference shares may be made

(*o*) Section 92.

(*p*) *Re Discoverers' Finance Corporation, Lindlar's Case*, [1910] 1 Ch. 312.

(*q*) *Bellerby* v. *Rowland and Marwood's Co.*, [1902] 2 Ch. 14.

"cumulative," and in that case, a deficiency in the dividend for one year is made up in subsequent years. If the shares are non-cumulative, and the dividend is passed, it will not be made up in subsequent years.

Deferred or Founders' Shares.—These are usually held by the promoters, and a dividend paid on them only if the dividend on the ordinary shares reaches a certain amount.

Stock.—When shares have been fully paid up, they may be turned into stock, if the articles so provide; or stock may be reconverted into shares (*r*). Stock differs from shares in that it may be transferred, split up into any fractional amount, whereas a share cannot be subdivided.

Capital, Dividends and Debentures.

The "capital" of a company may mean (1) the nominal capital, *i.e.*, the amount named in the memorandum of association; (2) issued capital; or (3) paid-up capital.

Increase.—Capital is increased when the authorised capital of the company has been issued and more funds are required. A company may always increase its capital where power to do so is contained in the articles (*s*). No special resolution is necessary as in the case of the reduction of capital. A resolution of the directors is sufficient, if it is so provided in the articles (*t*). Where capital is increased the memorandum must be altered accordingly, and notice must be given to the registrar within fifteen days of the resolution authorising the increase (*u*).

(*r*) Sections 41—43.
(*s*) Section 41.
(*t*) *Moseley* v. *Koffyfontein Mines, Limited*, [1910] 2 Ch. 282.
(*u*) Section 44.

Reduction.—A company may reduce its capital "in any way" by special resolution confirmed by the court, if it is authorised to do so by its articles (*x*). This is often done to enable the company to pay dividends with safety when assets are lost, or to enable it to borrow fresh capital and increase the proportional interest of the new shareholders. The words "and reduced" must be added to the name of the company if the reduction involves a diminution of the company's assets (*y*). In two cases the leave of the court is not required for the reduction, *i.e.* :

(1) When the company desires to cancel shares unissued (*z*) :

(2) When the company desires to pay back capital out of accumulated profits with the right to call it up again (*a*).

Neither of these are regarded as "reduction of capital" within the meaning of the Act.

Dividends.—The mode of payment is determined by the articles ; dividends are usually declared by the directors with the sanction of a general meeting. The most important rule as to their payment is this : Dividends must not be paid out of capital, but only out of profits. Capital, however, may be lost without precluding the payment of a dividend, although from a commercial standpoint the loss should be provided for (*b*). On the other hand, any appreciation in the value of the assets may be paid out as dividends, but the whole accounts for the year must be taken into

(*x*) Section 46.
(*y*) Section 48.
(*z*) Section 41 (1).
(*a*) Section 40.
(*b*) *Lee* v. *Neuchatel Asphalte Co.* (1887), 41 Ch. D. 1.

consideration. A realised accretion to the estimated value of one item cannot be deemed to be profit divisible among the shareholders without reference to the whole accounts fairly taken (*c*).

Payment of Interest out of Capital.—This is allowed where shares are issued to defray the expenses of construction, etc. upon so much of the capital as is paid up, provided that—

(1) Such payment is authorised by the articles, or special resolution ;
(2) Such payment is sanctioned by the Board of Trade ;
(3) Payment must not extend beyond the half-year next after the half-year during which the works are completed ;
(4) The rate of interest must not exceed 4 per cent. ;
(5) The interest paid is not to operate as a reduction of the amount paid up on the shares ;
(6) The accounts of the company must show the capital on which the interest has been paid (*d*).

Debentures.—A debenture is an instrument issued by the company providing for the payment of a sum of money with interest. It is usually one of a series, but a single debenture may be issued.

Debenture stock is the same as a debenture, except that the loans are consolidated for convenience, and are subdivisible. A mortgage debenture creates a charge on property, and is usually secured by a trust deed. A debenture may be made payable to bearer, and so

(*c*) *Foster* v. *New Trinidad, Limited*, [1901] 1 Ch. 208.
(*d*) Section 91.

become a "negotiable" instrument. When a company charges its undertaking and all its property present and future, this is said to be a "floating charge." Its characteristics are:

(1) It is a charge on a class of assets present and future,
(2) which in the ordinary course of business would be changing from time to time;
(3) It is contemplated that until some steps are taken, the company shall carry on business in the usual way (*e*).

Registration.—The following mortgages or charges must be registered with the Registrar of Companies (*f*):

(1) To secure any issue of debentures;
(2) On uncalled capital;
(3) An instrument which if made by an individual would be a bill of sale;
(4) A floating charge;
(5) A mortgage of land or book debts.

If not registered within twenty-one days, the above are void against the liquidator and creditors. The following particulars must be given in registering the charge: (1) The amount secured; (2) Dates of creation; (3) Description of property charged; (4) Names of trustees (if any) for the debenture-holders (*g*). The company must also keep copies of these registered mortgages, and also a register of all mortgages affecting the company's property (*h*).

(*e*) *Re Yorkshire Woolcombers' Association*, [1903] 2 Ch. 284.
(*f*) Section 93.
(*g*) Section 93 (3).
(*h*) Section 100.

Debentures are not part of the company's capital, and, therefore, unlike shares, they can be issued at a discount.

Remedies of Debenture-holders.—If the company makes default, the following remedies are open to the holder :

(1) He may appoint a receiver himself, if the conditions of the debenture allow him to do so ;

(2) He may bring an action on behalf of himself and the other debenture-holders, to obtain payment or enforce his security by sale. The court will then appoint a receiver, and (if necessary) a manager, until sale. The court will sometimes authorise the receiver to borrow money for the purposes of the business ;

(3) He may apply for foreclosure, but this is unusual ;

(4) He may, as a creditor, present a winding-up petition (this also is unusual).

Where debentures are a floating charge and a receiver is appointed, preferential debts must be paid before the claims of the debenture-holders (*i*).

THE MANAGEMENT OF THE COMPANY.

I. Directors.

The company's business is usually, though not necessarily, managed by directors. Their position is that of (1) trustees (*k*), and (2) agents for the company.

(*i*) *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56.

(*k*) Section 107.

The first directors are usually named in the articles. This method of appointment is only valid if they have—

(1) Signed and filed with the registrar a written consent to act ;

(2) Signed the memorandum for their qualification shares (if any), or a contract to take them from the company and to pay for them (*l*).

If the articles contain provisions as to a director's qualification shares, the amount must be disclosed in the prospectus (*m*), and the director must take them up within two months of his appointment (*n*). The company cannot commence business until every director has taken them up and paid on them the amount payable on application and allotment (*o*). Directors are not entitled to any remuneration apart from provision in the articles or express agreement. A director cannot make a contract with the company, unless he is expressly given power to do so in the articles. The powers of the directors cease on the commencement of a winding up.

II. Accounts and Auditors.

Accounts.—Directors are required to keep proper accounts, *i.e.*, the capital account, which must be included in the annual summary; (2) a profit and loss account which must be laid before the company in general meeting once a year. The balance sheet to be included in the "annual summary" need not include a statement of profit and loss (*p*).

(*l*) Section 72.
(*m*) Section 81.
(*n*) Section 73.
(*o*) Section 87.
(*p*) Section 26 (3).

Auditors.—Every company must, at each annual general meeting, appoint auditors (*q*). No person other than a retiring auditor may be appointed at an annual general meeting, unless fourteen days' notice of intention to nominate him has been given by a shareholder.

An auditor, if appointed by the articles, or at the annual general meeting, is an "officer" of the company, and as such may be liable in a winding up, together with the other officers, for damages for breach of trust (*r*). An auditor, informally appointed, is not so liable (*s*). The auditors have the right of access at all times to the company's books, accounts and vouchers, and can require any information or explanation from the officers (*t*). Their duty is to report on the accounts and on every balance sheet laid before the company; the report must state:

(1) Whether or not they have obtained all the information and explanations they have required;

(2) Whether, in their opinion, the balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanation given to them, and as shown by the books of the company (*u*).

The balance sheet must be signed by two directors, and the auditor's report must be attached thereto or referred to therein. The report must be read in general meeting, and be open to the inspection of any shareholder.

(*q*) Section 112.
(*r*) *Re London and General Bank*, [1895] 2 Ch. 166; and see s. 215.
(*s*) *Re Western Counties Bakeries Co.*, [1897] 1 Ch. 617.
(*t*) Section 113 (1). (*u*) Section 113 (2).

The shareholder, however, is not entitled to a copy of either report or balance sheet without paying for it (*x*). For a breach of these provisions every officer of the company, who is knowingly a party to the default, is liable to a fine. The auditor must act honestly and take reasonable care that what he certifies is true. On the other hand, he is not bound to be suspicious where there are no circumstances to excite suspicion (*y*).

As to the audited statement in the form of a balance sheet to be sent by a company each year to the registrar, see under "ANNUAL SUMMARY," *ante*, pp. 205, 206.

Remuneration.—The remuneration of an auditor is fixed by the company in general meeting, but where the directors employ an auditor to fill a casual vacancy they can fix his remuneration (*z*).

III. Meetings and Resolutions.

Statutory Meeting.—Every new company must hold this meeting not more than three months from the date when the company is entitled to commence business (*a*). It is a general meeting of members, and seven days beforehand the directors must forward to each the "statutory report," stating :

(1) The total number of shares allotted ;
(2) The amount of cash received for such shares ;
(3) An abstract of receipts on capital account, showing those from shares and debentures and other sources, and of the payments made thereout ;
(4) An account or estimate of preliminary expenses ;

(*x*) Section 113 (3).
(*y*) *Re Kingston Cotton Mill*, [1896] 2 Ch. 288.
(*z*) Section 112.
(*a*) Section 65.

(5) The names, addresses and descriptions of directors, auditors (if any), manager (if any), and secretary ;

(6) Particulars of any contract proposed to be modified and of proposed modification.

In respect of (1), (2) and (3), the report must be certified as correct by the company's auditors.

This report must be filed. In default of filing the report or holding the meeting, any shareholder may present a petition for winding up the company.

General Meeting.—A general meeting of members must be held once a year, and not more than fifteen months after the last general meeting (*b*). If default is made, the court may, on the application of any member, order a general meeting to be called.

Extraordinary Meeting.—On the requisition of the holders of not less than one-tenth of the issued share capital, the directors must call an extraordinary meeting. The requisition must state the objects of the meeting. If the directors neglect to call the meeting within twenty-one days, the requisitionists may call it themselves (*c*).

Resolutions.—(1) An ordinary resolution is passed by a majority of those present at a general meeting (*d*).

(2) An extraordinary resolution is one passed by a three-quarters majority of members present in person or by proxy at a general meeting of which notice specifying the intention to pass the resolution as an extraordinary resolution has been duly given (*e*).

(*b*) Section 64. (*c*) Section 66.

(*d*) Seven days' notice of a general meeting is usually necessary. See Article 49 of Table A.

(*e*) Section 69.

(3) A special resolution necessitates two meetings. At the first it must be passed in the manner required for the passing of an extraordinary resolution. The second meeting must be held not less than fourteen days or more than a month afterwards: the resolution passed at the first meeting must then be confirmed by a simple majority of members present in person or by proxy.

Subject to any regulations in the articles a meeting may be called by seven days' notice in writing served on every member (*f*).

A copy of every special or extraordinary resolution must be sent to the registrar (*g*).

PRIVATE COMPANIES.

A private company is one that by its articles—

(a) restricts the right to transfer its shares;

(b) limits its number of members to fifty (exclusive of persons in the employment of the company);

(c) prohibits any invitation to the public to subscribe for shares or debentures (*h*).

Only two persons are needed to form a private company, and in addition to this the latter has the following privileges under the Act:

(1) The "annual summary" need not include a balance sheet (*i*).

(2) No "statutory report" is necessary (*k*).

(*f*) Section 67.
(*g*) Section 70.
(*h*) Section 121.
(*i*) Section 26 (3).
(*k*) Section 65.

(3) The directors can act without filing their consent or signing the memorandum or a contract for their qualification shares (*l*).

(4) No "statement in lieu of prospectus" is necessary (*m*).

(5) No "minimum subscription" is required before proceeding to allotment or commencing business (*n*).

(6) Holders of preference shares and debentures have no legal right to inspect balance sheets (*o*).

(B) THE COMPANY IN LIQUIDATION.

From now until the end of the chapter it is proposed to deal with the winding-up of the company; references in the notes to "Rules" are to the Companies (Winding Up) Rules, 1909. A company may be dissolved in three ways:

(1) Compulsory winding up;

(2) Voluntary winding up;

(3) Winding up under the supervision of the court.

There is one feature common to all three methods, namely, that a liquidator is required to administer the company's property and distribute the assets, first among the creditors, and then among the shareholders of the company.

COMPULSORY LIQUIDATION.

A company may be wound up by the court (*p*):

(1) If the company has passed a special resolution to that effect;

(*l*) Section 72.
(*m*) Section 82.
(*n*) Sections 85, 87.
(*o*) Section 114.
(*p*) Section 129.

(2) If default is made in filing the statutory report or in holding the statutory meeting ;

(3) If the company does not commence its business within a year of its incorporation or suspends its business for a whole year ;

(4) If the number of its members is reduced below seven, or in the case of a private company below two ;

(5) If the company is unable to pay its debts ;

(6) If the court is of opinion that it is just and equitable that the company be wound up (*q*).

With regard to (4), a company is deemed to be unable to pay its debts :

(1) If a creditor for over £50 has served a demand requiring payment by leaving it at the registered office, and the company has for three weeks neglected to pay, secure, or compound the debt ;

(2) If execution is returned unsatisfied in whole or in part ;

(3) If it is proved to the satisfaction of the court, taking into account its contingent and prospective liabilities, that it is unable to pay (*r*).

Who may Petition.—An application for a compulsory winding-up order must be made by petition to the court. It may be presented either by the company, or a creditor, or a contributory.

A contributory cannot petition unless (*s*)

(1) He is an original allottee ; or,

(*q*) *E.g.*, where the whole object of the company is fraudulent (*Re T. E. Brinsmead & Sons*, [1897] 1 Ch. 45, 406).

(*r*) Section 130. (*s*) Section 137.

(2) He has held shares in the company for at least six months during the eighteen months before petition ;

(3) The shares have devolved upon him through death, or during the whole of any part of the six months aforementioned have been held by his wife or his or her trustee.

But any contributory may petition if the number of members of the company has fallen below the minimum allowed by the Act. The court is not obliged to make the order but may have regard to the wishes of the creditors or contributories (*t*). All persons served with the petition and all creditors and contributories may appear and support or oppose the petition, but they must give notice of their intention to the petitioner.

Procedure under the Order.—When the order for winding up is made, the registrar of the court forwards copies of the order to the official receiver, who gives notice to the Board of Trade (*u*). The Board of Trade gazettes notice of the order, and the official receiver then becomes provisional liquidator until he or another person is appointed liquidator. In the absence of another appointment the official receiver is appointed liquidator ; he is styled "Official Receiver and Liquidator" (*x*). When the order is made the official receiver must summon separate meetings of creditors and contributories to determine (*y*) : (1) whether application shall be made to the court to appoint a liquidator in place of the

(*t*) Section 145.
(*u*) Rule 41.
(*x*) Section 149 (9).
(*y*) Section 152.

official receiver ; and (2) whether application shall be made to the court to appoint a committee of inspection, and who are to be the members of the committee when appointed.

For the passing of these resolutions by creditors and contributories, a majority in number and value of those voting, whether personally or by proxy, is required in each case. The value of contributories is reckoned according to votes given by the company's articles. This is the only form of resolution in a compulsory winding up.

If both meetings pass the same resolutions, the court forthwith may make the appointment : if there is a difference the court decides it (*z*). In any case it is the duty of the official receiver as soon as possible to report the result of each meeting to the court.

If any person other than the official receiver is appointed liquidator by the court in accordance with these resolutions, he cannot act as such until he has notified his appointment to the Registrar of Companies and given security in the prescribed manner to the satisfaction of the Board of Trade. If he fails to do so, the court will rescind the order of appointment (*a*).

If the office of liquidator becomes vacant, the vacancy is filled by the court ; until this is done the official receiver acts as liquidator (*b*).

Statement of Affairs.—When the court has made the winding-up order, the official receiver may require the secretary or other chief officer of the company, or any persons who have been directors or taken part in the

(*z*) Section 152 (2) and r. 55.
(*a*) Section 149 (3) (c) and r. 57. (*b*) Section 149 (6), (7).

formation of the company within one year of the winding up, to send in a "statement of affairs of the company," showing its assets, debts, and liabilities, its creditors and the securities held by them (*c*). This statement must be verified by affidavit, and be made within fourteen days of the order or such extended time as the official receiver may appoint. The official receiver may allow a reasonable sum for the costs of making this statement, but no expenses will be allowed (except by the court), unless they are applied for before they are incurred. The statement is open to inspection either by creditors or contributories, and in due course the official receiver makes his report on the affairs of the company as to—

(1) The amount of capital issued, subscribed and paid up
(2) The estimated amount of assets and liabilities.
(3) The cause of the company's failure.
(4) Whether further inquiry is desirable as to the promotion or failure of the company or the conduct of its business (*d*).

He may make a further report, stating in particular whether in his opinion fraud has been committed by any person in the promotion of the company or since its formation by any officer of the company (*e*).

Committee of Inspection.—It will by this time have been decided whether the official receiver is to act as liquidator or whether a liquidator is to be appointed in his place; in the latter case a committee of inspection may be appointed to act under the liquidator (*f*). This committee must consist of (a) creditors,

(*c*) Section 147 and r. 57.
(*d*) Section 148 (1) and r. 60.
(*e*) Section 148 (2).
(*f*) Section 152 (1) (b).

(b) contributories, (c) persons holding general powers of attorney from creditors or contributories (*g*). The committee must meet at least once a month, and beyond that as often as the liquidator or a member of the committee summons it. It must audit the liquidator's accounts (*gg*). Neither the liquidator nor any member of the committee may purchase the assets of the company without the leave of the court; nor may any member of the committee make a profit out of the winding up without the sanction of the court. The costs of obtaining such sanction are to be borne by the person in whose interest it is obtained (*h*).

Special Manager.—The official receiver may, if he becomes liquidator, make application to the court, supported by a report, for the appointment of a special manager who will manage the company's business in the interests of creditors and contributories generally (*i*). The special manager so appointed must give security to the Board of Trade and account to the official receiver who adds the total of receipts and payments, when approved, to his own account (*k*). The court fixes the remuneration of the special manager, and may increase it afterwards for good cause (*l*).

The security given by a special manager or liquidator (other than the official receiver) is fixed by the Board of Trade; upon security being furnished, the Board issues a certificate to that effect, which is filed with the registrar. The costs of furnishing the security must

(*g*) Section 160.

(*gg*) Winding-up Rules, 1909, rr. 169, 171.

(*h*) Rules 157—159.

(*i*) Section 161 and r. 48.

(*k*) Rule 49. The special manager's accounts must be verified by affidavit.

(*l*) Rule 48 (2).

be borne personally and are not to be charged against the assets of the company (*m*).

List of Contributories.—A contributory means "every person liable to contribute to the assets of a company in the event of its being wound up" (*n*). As soon as possible after the winding-up order the court settles the "list of contributories," which is made up as follows:

(1) The "A." list consisting of present members of the company.

(2) The "B." list consisting of past members, *i.e.*, persons who have ceased to be members within a year of the commencement of the winding up (*o*).

A contributory on the "B." list is not called upon until assets have been applied in payment *pari passu* of debts. He is then liable for the amount left unpaid by the corresponding "A." contributory: and his liability is in any case restricted to debts contracted before he ceased to be a member. Where there are several past holders of the same shares within a year, the liquidator may place them all on the "B." list, but between themselves each transferor is entitled to an indemnity from his transferee.

The contributory cannot set off against calls sums due to him from the company by way of dividend; but such sums may be taken into account in adjusting the rights of contributories among themselves. Similarly, a contributory cannot set off debts against calls; his only course is to prove for the debt as a creditor in the winding up. But if a contributory, who is a creditor of the company in liquidation, becomes bankrupt after the

(*m*) Winding-up Rules, 1909, r. 57.
(*n*) Section 124.
(*o*) Section 163.

commencement of the winding up, the debt should be set off against the calls; whether the claim is made in the bankruptcy or in the winding up, the same rule prevails as in bankruptcy (*p*).

The liquidator must give due notice in writing to the contributories of their inclusion in the list, stating in what character and for what number of shares they are included. They may then apply to the court by summons within twenty-one days to have their names removed (*q*). Calls are made by the liquidator with the sanction of the committee of inspection, or of the court, if there is no such committee. Calls may be made for money wherewith (1) to pay the debts, costs and expenses of winding up, (2) to adjust the rights of contributories, *inter se* (*r*).

The meeting of the committee of inspection to sanction the call must be summoned by the liquidator by notice seven days beforehand stating the proposed amount of the call and its purpose (*s*). It must also be advertised, so that a contributory may attend and be heard in reference to the call or communicate his views. Any statement by a contributory must be considered before making the call. If a call is authorised, the resolution or order must be filed with the registrar (*t*), and a copy served upon each contributory included in the call (*u*). Payment of the call may be enforced by order of court made upon a summons by the liquidator (*x*).

(*p*) Section 207. See also *Re Duckworth* (1867), L. R. 2 Ch. 578, and *Ex parte Strang* (1870), L. R. 5 Ch. 492.

(*q*) Rules 77—81.

(*r*) Section 166.

(*s*) Rule 83. If there is no committee of inspection the liquidator must obtain the leave of the court.

(*t*) Rule 85.

(*u*) Rule 86.

(*x*) Rule 87.

Powers of Liquidators.—With the sanction of the court or the committee of inspection, the liquidator, in a winding up by the court, has power (*y*)—

(1) To bring and defend actions in the name of the company.
(2) To carry on the business of the company for the beneficial winding up thereof (*z*).
(3) To employ a solicitor or other agent.
(4) To pay any class of creditors in full (*a*).
(5) To compromise with creditors or persons claiming to be creditors.
(6) To compromise calls, debts and questions affecting assets.

Without sanction he has power—

(1) To sell property.
(2) To execute deeds, receipts and other documents in the name of the company and use the company's seal.
(3) To prove and receive dividends in the bankruptcy of a contributory.
(4) To draw, accept and indorse bills in the name of the company, and borrow money on the assets.
(5) To take out letters of administration in his official name to a deceased contributory.
(6) To do all acts necessary for winding up the company except those for which sanction is required.
(7) To apply to court for directions.

(*y*) Section 151.
(*z*) *E.g.*, for sale as a going concern.
(*a*) Section 214 (1) (ii).

Proof of Debts (*b*).—The creditor must prove his debt by affidavit, giving particulars of the debt and specifying vouchers; the creditor must state therein whether the debt is secured or not. He must deduct trade discount but need not deduct discount exceeding 5 per cent. which he may have agreed to allow for cash. Rent or other periodical payments may be apportioned up to the date of the winding-up order.

Upon overdue debts on which interest has not been reserved the creditor may prove for interest at 4 per cent. where (*c*):

(1) The debt was payable under a written instrument at a certain time; or,

(2) If payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until payment.

A creditor may prove for future debts, deducting 5 per cent. per annum computed from the declaration of the dividend to the time when the debt would have been payable according to the contract (*d*).

The liquidator may fix a day, not less than fourteen days from the date of notice, on or before which creditors are to prove. Notice of this must be given by advertisement in some newspaper and to every creditor mentioned in the statement of affairs, who has not proved. After that date claims may be excluded (*e*).

The liquidator other than the official receiver must examine all proofs within twenty-eight days, and admit or reject proofs in writing, stating the grounds of

(*b*) Rules 88—95.
(*c*) Rule 97.
(*d*) Rule 98.
(*e*) Rule 102.

rejection in writing (*f*). Dissatisfied creditors can apply to the court within twenty-one days, and the court has power to reverse or vary the liquidator's decision (*g*).

Proofs improperly admitted may be afterwards expunged by the court on the application of the liquidator, or if the liquidator will not interfere, on the application of a creditor or contributory (*h*).

Dividends.—The liquidator, before declaring a dividend, must give two months' notice (1) to the Board of Trade, to be gazetted, (2) to such of the creditors mentioned in the statement of affairs as have not proved (*i*). Such notice must specify the latest date for lodging proofs, which must not be less than fourteen days from the date of the notice. Appeals against rejection may be brought within seven days, after which the liquidator may declare the dividend, sending notice to each creditor whose proof has been admitted.

Meetings.—The liquidator may hold meetings of creditors and contributories from time to time to ascertain their wishes in matters relating to the winding up; and he must do so when the creditors and contributories by resolution direct, or when requested to do so by one-tenth in value of the creditors or contributories (*k*). The court has power to order such meetings to be held (*l*).

Accounts and Audit.—The liquidator must keep (1) a record book, in which he must enter minutes

(*f*) Rules 103, 113.
(*g*) Rule 104.
(*h*) Rules 105, 106.
(*i*) Rule 150.
(*k*) Section 158 and r. 121.
(*l*) Section 219.

of proceedings at meetings (*m*); (2) a cash book, containing entries of receipts and payments (*n*). These books must be submitted to the committee of inspection not less than once in every three months, to be audited by them (*o*).

Every six months the liquidator must transmit to the Board of Trade (1) a copy of his cash book with vouchers and copies of the certificates of audit by the committee of inspection; (2) a report on the position of the liquidation. With the first accounts he must forward a summary of the company's statement of affairs, showing in red ink assets realised and explaining the cause of non-realisation. The accounts must be verified by affidavit.

Where the liquidator carries on the company's business, he must keep a trading account and incorporate the total weekly amount of receipts and payments in the cash book. The trading account must be verified by affidavit and submitted to the committee of inspection once a month (*p*).

Pending Liquidations.—If a winding up is not concluded within one year, the liquidator must send to the registrar (in duplicate) a statement of receipts and payments, and particulars of the proceedings in, and position of, the liquidation. If there have been no receipts or payments, he must send an affidavit to that effect. This statement must be rendered in every form of liquidation, whether compulsory, voluntary or under

(*m*) Section 156 and r. 166.
(*n*) Rule 167.
(*o*) Rules 167 (2), 169.
(*p*) Rules 170, 171.

supervision. It is open to the inspection of creditors and contributories on payment of the prescribed fee (*q*).

Companies' Liquidation Account.—In all forms of winding up the liquidator must pay all undistributed or unclaimed moneys into the Companies' Liquidation Account at the Bank of England, and the Board of Trade will give him a certificate of receipt for money so paid (*r*). In a compulsory liquidation the Board of Trade, on the application of the committee of inspection, may give their liquidator leave to have an account with another bank (*s*). Otherwise all unclaimed dividends and undistributed assets which have remained in his hands for six months must be paid into the Companies' Liquidation Account. A liquidator who requires money for payment out must apply to the Board of Trade, which either makes an order for payment out to the liquidator or directs cheques to be issued to the persons entitled (*t*).

PREFERENTIAL PAYMENTS.

(i) *Costs of Winding Up.*—In the event of the assets being insufficient to satisfy liabilities the court may order payment of costs, charges, and expenses to be made in such order of priority as it thinks just (*u*). The rule is that, first, the costs of the petition are to be paid; next, the costs of the winding up (including solicitor's charges); and, finally, the remuneration of the liquidator. The proper order of payment is set out in detail in the Winding-up Rules (*v*).

(*q*) Section 224 (1)—(3).
(*r*) Section 224 (4).
(*s*) Section 154.
(*t*) Rule 196.
(*u*) Section 171.
(*v*) Rule 187.

(ii) *Debts Entitled to Priority.*—By statute certain debts are given priority in the winding up (*w*) ; these are as follows :

(1) Parochial and local rates due within the year preceding the commencement of the winding up (*x*) and assessed taxes, land tax, property tax and income tax assessed up to April 5th preceding the same date, but not exceeding the amount due for one year.

(2) Wages or salary of clerk or servant not exceeding £50 for services rendered during four months before the commencement of the winding up (*y*).

(3) Wages of labourer or workman not exceeding £25, for services rendered during two months before the commencement of the winding up.

(4) Wages of agricultural labourer who has agreed for a lump sum at the end of the year of hiring to an amount proportionate to the time of service up to the winding up.

(5) All amounts (not exceeding £100) for which the company is liable under the Workmen's Compensation Acts, where the liability has accrued before the winding-up order. If the compensation is a weekly payment, the amount due in respect thereof shall be taken to be the amount of the lump sum for which the weekly payment could be redeemed (*z*).

(*w*) Section 209.

(*x*) In compulsory winding up, unless the company commenced to to be wound up voluntarily, the date of the winding-up order is regarded, for the purposes of this section, as being the "commencement of the winding up." See s. 139.

(*y*) The managing director of a company is not a "clerk or servant" within the meaning of this section (*In re Newspaper Proprietary Syndicate, Limited*, [1900] 2 Ch. 349).

(*z*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (3).

The foregoing debts rank equally among themselves, and are to be paid forthwith after a sum sufficient for the costs and expenses of the winding up has been retained.

Rent.—A landlord is not entitled to any peculiar preference over other creditors in the winding up. As regards his rights of distress the rule is that distress levied after the commencement of a winding up, except by leave of the court, is void (*a*) ; but the court may allow the landlord to distrain (*b*), and usually does so in two cases, viz. : (1) in respect of rent due before or after the winding up, if the company is not the landlord's immediate tenant ; (2) in respect of rent due after the winding up if the liquidator retains possession for the company's sole benefit.

Distress levied within three months of the winding-up order is subject to the payment of all preferential debts.

Remuneration.—The liquidator's remuneration in a winding up by the court, is fixed, unless the court orders otherwise, by the committee of inspection ; if it is unnecessarily large the Board of Trade may apply to the court to reduce it (*c*). The liquidator is not allowed to make any arrangement with persons connected with the winding up as to his remuneration (*d*).

The remuneration must consist partly of commission payable out of the amount realised, after deducting the amount paid to secured creditors (other than debenture holders) out of their securities, and partly of commission on the amount distributed in dividend.

Termination of Liquidator's Office.—The liquidator vacates office if a receiving order is made against him (*e*).

(*a*) Section 211.
(*b*) Sections 140, 142.
(*c*) Section 149 (8) and r. 154.
(*d*) Rule 155.
(*e*) Rule 163.

He may also be removed by the Board of Trade, if he does not faithfully discharge his duties (*f*), or by the court "upon cause being shown" (*g*).

Similarly, he may resign, but he must summon separate meetings of creditors and contributories to decide whether the resignation shall be accepted. If they so decide, the liquidator must file a memorandum of the resignation with the registrar, and send notice to the official receiver, whereupon the resignation takes effect. Otherwise, he must report the result to the court and the official receiver, by whom the question of his resignation is then decided (*h*).

The liquidator may apply for his release (1) when as much as is possible of the property of the company has been realised; (2) on removal; (3) on resignation (*i*).

The liquidator must first give notice to creditors who have proved and contributories, with summary of receipts and payments.

Release is granted by the Board of Trade, and discharges the liquidator from all liability (*k*). Notice of the order for release must be gazetted.

VOLUNTARY LIQUIDATION.

A company may be wound up voluntarily (*l*)—

(1) When the period fixed by the articles for the duration of the company expires or an event occurs, on the occurrence of which the articles provide that it shall be dissolved, and the

(*f*) Section 159.
(*g*) Section 149 (6).
(*h*) Rule 162.
(*i*) Section 157.
(*k*) But the order may be revoked on proof that it was obtained by fraud, etc. (s. 157 (3)).
(*l*) Section 182.

company passes a resolution in general meeting to that effect.

(2) If the company passes a special resolution to that effect.

(3) If the company passes an extraordinary resolution to the effect that it cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up.

In (2) and (3) the company must give notice of the resolution by advertisement in the Gazette.

A voluntary winding up dates from the passing of the resolution which authorises it (*m*).

Effects. — (1) The company ceases to carry on business except for the winding up, but the corporate state of the company continues until it is dissolved (*n*).

(2) Its property must be applied for the benefit, first, of its creditors, and next among the members according to their rights (*o*).

(3) Any alteration in the status of the members is void, and transfers of shares made without the sanction of the liquidator are also void (*p*).

The Liquidator.—The company in general meeting then appoint a liquidator and fix his remuneration (*q*). On his appointment all the powers of the directors cease except so far as the company in general meeting or the liquidator sanctions the continuance thereof. Where several liquidators are appointed, at least two must concur in the exercise of their powers, unless

(*m*) Section 183.
(*n*) Section 184.
(*o*) Section 186 (1).
(*p*) Section 205.
(*q*) Section 186 (ii).

it is otherwise resolved by the meeting at the time of their appointment.

Where there is no liquidator, the court, on the application of a contributory, may appoint one ; upon cause shown it may remove one and appoint another (*r*).

Powers of Liquidator.—The liquidator may exercise all the powers of a liquidator in a compulsory winding up. He may also, with the sanction of a special resolution of the company, on the sale of the company's business to another company receive shares, etc., in lieu of cash (*s*). He may enter into arrangements with creditors or members, which will be binding on the company if sanctioned by an extraordinary resolution, and on creditors or members of any class if acceded to by a three-quarters majority (*t*). Finally, he can apply to the court for the determination of any question arising in the winding up (*u*).

Duties of Liquidator.—The liquidator in a voluntary winding up must file a notice of his appointment with the registrar within twenty-one days. He must, within seven days, give notice to creditors of a meeting to be held within fourteen days ; at that meeting the creditors have the right to determine whether an application shall be made to the court for the appointment of another liquidator in his place or to act jointly with him, or for the appointment of a committee of inspection (*x*).

The liquidator has power to call general meetings of the company at any time ; and if the winding up

(*r*) Section 186 (viii), (ix).
(*s*) Section 192.
(*t*) Section 120.
(*u*) Section 193.
(*x*) Section 188.

continues for more than a year, he is obliged to call a general meeting at the end of this and each succeeding year, and give the meeting an account of his conduct of the winding up (*y*).

Costs, charges and expenses properly incurred by him, including his remuneration, are payable out of the assets of the company in priority to all other claims (*z*). As regards other preferential payments the same rules apply as have been already laid down in dealing with compulsory liquidation (*ante*, p. 231). All moneys received by the voluntary liquidator must be paid into the Companies' Liquidation Account, as to which see *ante*, p. 230.

When the affairs of the company are fully wound up, the liquidator prepares his account, and lays it before a final general meeting of the company, notice of which must appear in the Gazette a month beforehand. The liquidator gives particulars of this meeting to the registrar, and three months from the date of registration thereof the company is deemed to be dissolved (*a*).

LIQUIDATION UNDER SUPERVISION.

When a company has by special or extraordinary resolution resolved to wind up voluntarily, the court may order that the voluntary winding up shall continue subject to the supervision of the court (*b*). The court may make this order on a petition for compulsory order. The voluntary liquidator is usually continued subject to

(*y*) Section 194. See *ante*, p. 229, as to "statements" required to be sent to registrar.

(*z*) Section 196.

(*a*) Section 195. (*b*) Section 199.

security being given, but the court sometimes appoints an additional liquidator. The liquidation continues in the same manner and the liquidator has the same powers as in a voluntary winding up, subject to any restrictions imposed by the court ; but the sanction of the court takes the place of extraordinary resolutions of the company.

TRANSFER AND RECONSTRUCTION.

It is often desirable to transfer a company's business and assets to another company in consideration of or in part consideration of shares in the transferee company. Such a transaction can be effected by a liquidator under a compulsory or supervision order (*c*), and also in a voluntary winding up (*d*). In the case of a voluntary winding up it is effected by a reconstruction scheme, which is carried out as follows : A special resolution is passed by the transferor company that the company be wound up, a liquidator appointed, and a general authority conferred on him to transfer the company's assets in return for shares, policies, or other interests in the transferee company (*e*). Proper notice of these resolutions must be given to the shareholders. Any member of the transferor company who did not vote in favour of the resolution at either of the meetings may, within seven days after the confirmatory meeting, write to the liquidator dissenting from the resolution and requiring the liquidator either (1) to abstain from

(*c*) Section 151. (*d*) Section 192.

(*e*) The transferee company must not be a foreign company (*Thomas* v. *United Butter Companies of France, Limited*, [1909] 2 Ch. 484).

carrying the resolution into effect, or (2) to purchase his interest at a price to be fixed by agreement or arbitration.

If the liquidator decides to take the second course the money must be paid before the company is dissolved. The company cannot deprive its shareholders of their rights to dissent under the section, and any provision to that effect, whether in the memorandum or articles, is void. If the scheme is unfair to a large body of shareholders in the old company, application may be made to the court to substitute a compulsory for a voluntary winding up; if the petition is successful, the scheme is void unless sanctioned by the court (*f*).

ARRANGEMENTS WITH CREDITORS.

A company, whether in liquidation or not, has power to enter into an arrangement with its creditors or members. For this purpose the court may order a meeting of creditors or members, as the case may be, to be held; this may be done on the application of the company, a creditor, a member, or the liquidator. If a majority in number, and three-fourths in value, of those present in person or by proxy agree to the arrangement, it is binding if sanctioned by the court (*g*). In a compulsory winding up, the court may defer its sanction until it has heard a report by the official receiver (*h*).

(*f*) *Re Consolidated South Rand Mines, Limited*, [1909] 1 Ch. 491.

(*g*) Section 120. (*h*) Rule 74.

PART III.

RULES RELATING TO SUBJECT-MATTER OF CONTRACTS.

The Sale of Goods.

This branch of the law is now to be found in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), to which Act reference is intended whenever in the course of the chapter the letters S. G. A. are used. A contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration, called the price (*a*). Goods include all personal chattels other than things in action and money (*b*).

The Goods Sold.—If, at the time of the contract, specific goods sold have ceased to exist without the knowledge of the seller, there is no contract (*c*). If there is an agreement to sell specific goods and subsequently the goods without the fault of the seller or buyer perish before the risk passes to the buyer (*d*), the agreement is avoided (*e*). Goods can be the subject of an agreement to sell, although they have not yet

(*a*) S. G. A., 1893, s. 1 (1).
(*b*) *Ibid.*, s. 62.
(*c*) *Ibid.*, s. 6.
(*d*) As to this, see *post*, p. 278.
(*e*) S. G. A., s. 7.

come into existence or been acquired by the seller (*f*). The distinction between a sale and an agreement for sale may be important, for whereas if the goods are actually sold the property passes at once, if there is but an agreement to sell, it will not become a sale until the time elapses or the conditions are fulfilled subject to which the property is to be transferred (*g*). When the purchaser obtains the goods under the terms of the agreement, the sale becomes complete. When the goods agreed to be sold are not the existing property of the seller, the beneficial interest (but not the legal property) passes to the buyer without further conveyance the moment they come into being, if they can be then identified as the goods agreed to be sold (*h*), and the agreement need not so specifically describe the goods as to make them easily identifiable; it suffices if, on coming into existence, they answer the description in the agreement, so as to be capable of being identified as the goods assigned (*i*). The result is, therefore, that save as against a transferee who acquires the legal interest for value and without notice of the prior equitable interest, the mere agreement to sell transfers the property in the goods to the purchaser. To get a title against everybody, the purchaser must acquire the legal interest as well (*k*).

The Price.—This must consist of money (*l*), else the contract is one of exchange and not of sale. If the

(*f*) S. G. A., s. 5. Goods yet to be acquired by the seller, or to be manufactured after the contract, are in the Act styled "future goods" (*ibid.*).

(*g*) Section 1 (4). As to the effect of this, see *post*, pp. 278 *et seq.*

(*h*) *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191.

(*i*) *Tailby* v. *The Official Receiver* (1888), 13 App. Cas., at p. 533.

(*k*) *Joseph* v. *Lyons* (1885), 15 Q. B. D. 280.

(*l*) S. G. A., s. 1 (1).

amount is fixed in the contract, this, of course, is the price payable ; sometimes the price is left to be fixed in a manner stated in the contract, or it may be determined by the ordinary course of dealing between the parties. Under all other circumstances a reasonable price is presumed to have been intended (*m*). A reasonable price is not necessarily the market price ; what is reasonable depends on the circumstances of each particular case (*m*). If the price is to be fixed by the valuation of a third party, and that third party cannot, or does not value, the agreement is avoided ; except that (i) so far as goods have already been delivered to and appropriated by the buyer, he must pay a fair price for them ; and (ii) if the third party is prevented from making the valuation by the act of a party to the contract of sale, that party may be sued for damages (*n*).

Who may Sell.

Capacity to contract is treated of *ante*, at p. 31.

As a rule, the owner (*o*) by himself or his agent alone can sell and give a good title (*p*) ; but the following cases are in this respect peculiar (*q*).

(a) *Sale of Goods in Market Overt.*—Market overt in the city of London is held every day except Sunday, and in every shop where goods are exposed for sale in the ordinary course of the trader's business. Elsewhere

(*m*) S. G. A., s. 8. (*n*) *Ibid.*, s. 9.
(*o*) One part owner may sell to another part owner (the Act, s. 1 (1)).
(*p*) S. G. A., s. 21 (1).
(*q*) It may happen that an owner, who is no party to the sale, may so act as to make it unjust that he should deny that he authorised the sale—*e.g.*, where the owner of goods so acts as to enable another fraudulently to dispose of the goods ; in such a case the owner is estopped from denying the authority of the fraudulent person. See *per* Lord HALSBURY in *Henderson* v. *Williams*, [1895] 1 Q. B., at p. 525.

certain days are set apart by prescription, grant, or otherwise, on which, at a particular place, market overt is held (*r*). But the transaction must have commenced and ended in open market—*e.g.*, sale by sample will not be sufficient to protect the buyer, unless the bulk be openly sold and transferred in open market (*s*). If the thing be sold in a private room (*t*), or between sunset and sunrise, market overt will be no protection to the purchaser. Sale *to* the trader in his shop seems not to be within the protection of market overt in the city of London (*t*). When goods are sold to a bonâ fide purchaser, without notice of the seller's defect or want of title in market overt, and according to the usage of the market, the sale is binding on the true owner (except as mentioned below), though he neither sold them nor authorised their sale (*u*).

If goods are stolen, and the owner prosecutes the thief to conviction, the property in the goods so stolen revests in the original owner, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise (*x*).

(b) *Sale by a Pawnee.*—He may generally sell the goods upon default (*y*).

(*r*) (1596), 5 Rep. 83 (b).

(*s*) *Hill* v. *Smith* (1812), 4 Taunt., at p. 532.

(*t*) *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.

(*u*) S. G. A., s. 22. Section 6 of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), provides for suspending the operation of this section in case of an appeal from the conviction, and if the conviction is quashed, its provisions do not take effect. This section does not dispense with the statutory formalities required on the sale of horses in market overt. See 2 & 3 Ph. & Mary, c. 7, and 31 Eliz. c. 12.

(*x*) S. G. A., s. 24 (1). See also the Larceny Act, 1861, s. 100, which enables the court to make a restitution order on conviction of the offender; but see *post*, p. 244, note (*g*).

(*y*) *Martin* v. *Reed* (1862), 31 L. J. C. P. 126, 128; and see *post*, p. 459.

(c) *Agents.*—An agent authorised to sell (*z*), or intrusted with goods, or the documents of title to them, may, within the scope of his business, and subject to certain restrictions, give a good title (*a*). As to this, see under "AGENCY" (*b*).

(d) *Sale by the Possessors of Goods or Documents of Title to them.*—Where a person having sold goods continues in possession of the goods or the documents of title (*c*) thereto, delivery or transfer of the goods or documents of title by such vendor or his mercantile agent (*d*), under any sale, pledge, or other disposition thereof, shall have the same effect as if such vendor or other person were expressly authorised by the owner of the goods to make the same; provided that the person to whom the sale or disposition has been made acts bonâ fide and without notice of the previous sale (*e*). Similarly, where a person having bought or agreed to buy goods (*f*), obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or

(*z*) S. G. A., s. 21.

(*a*) See the Factors Act, 1889 (52 & 53 Vict. c. 45); S. G. A., s. 21 (2).

(*b*) *Ante*, pp. 138 *et seq.*

(*c*) "Document of title" has the same meaning as in the Factors Act, 1889 (S. G. A., s. 62). As to what the expression includes, see *ante*, p. 141.

(*d*) For the meaning of this, see *ante*, p. 138.

(*e*) S. G. A., s. 25 (1). A similar provision is to be found in the Factors Act, 1889, s. 8.

(*f*) A purchase from a possessor under a mere option to buy does not give the purchaser title under this section; therefore, one who holds goods under a hiring agreement, with an option to purchase, cannot give a good title to a sub-purchaser or pledgee (*Helby* v. *Matthews*, [1895] A. C. 471).

documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner (*g*)—*i.e.*, his disposition of the goods or documents of title will, in general, give a good title to the innocent sub-purchaser or pledgee, though in fact he has no right to sell or pledge the goods (*h*). So in *Cahn* v. *Pockett's Bristol, etc. Co., Limited* (*i*), the seller of goods forwarded to the buyer a bill of lading indorsed in blank, together with a draft for the price for acceptance. The buyer did not accept the draft, but transferred the bill of lading to the plaintiffs, who took it in good faith and for value. The seller stopped the goods *in transitu*. The Court of Appeal held that the plaintiffs had acquired a good title to the goods, as, although it was not intended that any property should pass to the original buyers until acceptance of the draft, they had nevertheless obtained possession of the documents of title with the consent of the seller.

(e) *Miscellaneous.*—The following (*inter alia*), though not owners, may give good titles: Sheriffs and similar officers who seize by way of execution (*k*), but if the

(*g*) S. G. A., s. 25 (2); and see the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9. And this is so though the true owner prosecutes, and obtains a conviction for larceny against the person disposing of the goods (*Payne* v. *Wilson*, [1895] 1 Q. B. 653); but the case was not within the Factors Act (*ibid.*, [1895] 2 Q. B. 537).

(*h*) Factors Act, 1889, s. 2.

(*i*) [1899] 1 Q. B. 643; 4 Com. Cas. 168.

(*k*) *Doe* v. *Donston* (1818), 1 B. & Ald. 230; *Goodlock* v. *Cousins*, [1897] 1 Q. B. 558.

real owner is not the judgment debtor, the title of the purchaser is not always good (*l*) ; masters of vessels who sell under stress of circumstances (*m*) ; innkeepers who sell goods left with them under the powers conferred on them by the Innkeepers Act, 1878 (*n*).

It should be added that if the title of the person selling is voidable and not void, he can give a good title to a purchaser who buys in good faith and without notice of the defect in title (*o*).

Formalities of the Contract.

Subject to certain statutory exceptions, a contract of sale may be in any form ; it may be made by word of mouth or in writing, partly by writing and partly by word of mouth, or merely implied from the conduct of the parties (*p*) ; but if the value of the property sold in the one contract amounts to £10 or upwards, it may be unenforceable by action unless evidenced by the proper writing. This was formerly provided by s. 17 of the Statute of Frauds, now replaced by s. 4 of the

(*l*) *Crane & Sons* v. *Ormerod*, [1903] 2 K. B. 37.

(*m*) See *post*, p. 489.

(*n*) 41 & 42 Vict. c. 38.

(*o*) S. G. A., s. 23.

(*p*) S. G. A., s. 3. Section 4 of the Statute of Frauds (as to which, see *ante*, p. 5), may affect a sale, inasmuch as the subject-matter may be an interest in land, or the agreement may be not to be performed within the year. Suffice it to say that the following have been held not to be interests in land : sale of growing crops which are *fructus industriales* (*e.g.*, potatoes) ; also growing crops which are *fructus naturales* (*e.g.*, timber), where it is intended that the *fructus* should be severed from the land before the property passes to the purchaser. See *Evans* v. *Roberts* (1826), 5 B. & C. 829 ; *Parker* v. *Staniland* (1809), 11 East, 362 ; *Smith* v. *Surman* (1829), 9 B. & C. 561. In *Green* v. *Marshall* (1876), 1 C. P. D. 35, the court said that the test is : Do the parties look to deriving benefit from the land, or do they look at it as a mere warehouse ? *Cf. Lavery* v. *Pursell* (1888), 39 Ch. D. 508.

Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which runs as follows :

> "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action (*q*) unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing (*r*) of the contract be made and signed by the party to be charged or his agent in that behalf."

From this it will be seen, that a contract for the sale of goods will not be enforceable by action unless there be either : (i) part performance, either by way of accepting *and* receiving the goods, or part payment of the price ; or (ii) an earnest ; or (iii) a memorandum signed ; or (iv) value under £10.

Two points of difficulty arose : Firstly. Is an agreement to deliver at a future time for a price a contract of sale within the statute ? Decisions were to be found both in favour of and against the inclusion of these executory agreements, but Lord Tenterden's Act (*s*), followed by the Sale of Goods Act, settled the question in favour of inclusion.

Secondly. When is a contract one of sale, and when one of work and labour done ? If A. employs a tailor

(*q*) The effect of this has been already dealt with (see *ante*, pp. 5, 6). "Action" includes "set-off" and "counterclaim" (the Act, s. 62).

(*r*) The contents of a memorandum which will suffice to satisfy the section are dealt with (*ante*, pp. 6—9 *et seq*). Further, as to contracts for the sale of goods which are not to be performed within a year, see *ante*, p. 11.

(*s*) 9 Geo. 4, c. 14, s. 7 ; now repealed as to this by the S. G. A., 1893.

to make a suit of clothes, the tailor supplying materials and labour, is this sale or work? If sale, the statute applies; if work, it does not. There can be little doubt that in this example the contract is one of sale, but more difficult cases arise. In *Clay* v. *Yates* (*t*), a printer agreed to print a work, the materials to be supplied to him; this was decided to be a contract for work and labour, not of sale; and this decision has been approved. Again, take the case of a picture to be painted by an artist; is the contract one for his skill, or for the sale of the picture? Pollock, C.B., thought the former (*u*), but Blackburn, J., the latter (*x*). In *Lee* v. *Griffin* (*x*), a dentist brought an action for artificial teeth supplied, and the court decided in favour of sale. "When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered" (Crompton, J.). "If the contract be such that it will *result in the sale of a chattel*, the proper form of action if the employer refuses to accept the article when made, would be for not accepting. But if the work and labour be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy" (Blackburn, J.).

This case was decided by a strong court, and the rule enunciated by Blackburn, J., has been styled by Mr. Benjamin as "a rule so satisfactory, and apparently

(*t*) (1856), 25 L. J. Exch. 237; 1 H. & N. 73.

(*u*) *Clay* v. *Yates*, *supra*.

(*x*) *Lee* v. *Griffin* (1861), 1 B. & S. 272; 30 L. J. Q. B. 252.

so obvious" (*y*); it may therefore be considered the safest guide to follow.

Acceptance and Receipt.—It will be noticed that the statute draws a distinction between acceptance and receipt, and requires both. There may be receipt without acceptance, there may be acceptance without receipt. "Receipt is often evidence of an acceptance, but it is not the same thing." Thus, if the vendor delivered goods to a carrier named by the purchaser, there is receipt by the purchaser, but not necessarily acceptance (*z*).

(a) What amounts to an acceptance?—This is now defined by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (3), which provides that: "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not." It follows that the meaning of the word "acceptance" in this section is not the ordinary meaning, nor that which the word bears in other portions of this very Act. An act which may amount to an "acceptance" sufficient to render writing unnecessary, may not amount to such acceptance as to compel the purchaser to keep goods not up to sample. Thus in *Page* v. *Morgan* (*a*), the defendant bought wheat by sample; when it arrived, it was partly unpacked and compared with the sample; the purchaser

(*y*) Benjamin on Sale (5th ed.), p. 158. Other cases are: *Atkinson* v. *Bell* (1828), 8 B. & C. 277; *Grafton* v. *Armitage* (1846), 2 C. B. 336.

(*z*) *Hunt* v. *Hecht* (1853), 8 Exch. 814.

(*a*) (1885), 15 Q. B. D. 228.

considered it defective, and at once rejected the whole: —*Held* (by the Court of Appeal), that there was evidence on which the jury might find an acceptance within the statute (*b*), though there was none of an acceptance sufficient to preclude objection to the goods. It appears, then, that an acceptance sufficient for the purposes of this section need not be such as to debar the plaintiff from objecting on account of quantity or quality; as was stated by COTTON, L.J., in *Kibble* v. *Gough* (*c*), "all that is wanted is a receipt, and such an acceptance of the goods, as shows that it has regard to the contract."

What amounts to such acceptance in specific cases is a question of fact. A mere obtaining of physical power over a thing is receipt rather than acceptance; but, on the other hand, if the purchaser marks the goods and leaves them with the vendor, there is an acceptance, though no receipt. The following are cases in which the question has arisen, it being submitted that those decided under the Statute of Frauds will serve as guides to the meaning of the statutory definition of acceptance now under consideration:

Buyers offer to resell the thing: —*Held*, evidence of an acceptance (*d*).

Defendant counted over goods and said "all right": —*Held*, an acceptance (*e*).

Defendant receives goods and keeps them an unreasonable time: — *Held*, evidence of acceptance (*f*).

(*b*) Statute of Frauds, s. 17. (*c*) (1878), 38 L. T. (N.S.) 204.
(*d*) *Blenkinsop* v. *Clayton* (1817), 7 Taunt. 597.
(*e*) *Saunders* v. *Topp* (1849), 4 Exch. 390.
(*f*) *Bushel* v. *Wheeler* (1850), 15 Q. B. 442.

Defendant had jewellery handed to him, and returned it at once, saying, "there is a mistake." This was probably no acceptance (*g*).

Receipt and acceptance of a sample may amount to acceptance or not according to whether the samples are or are not part of the bulk to be delivered (*h*).

Goods were delivered to the buyer, who took a sample from them, and, after examining it, said that the goods were not equal to the sample, and that he would not have them :—*Held*, an acceptance (*i*).

Defendant merely inspected the goods, and then wrote on the advice note, "Rejected. Not according to representation" :—*Held*, no acceptance (*k*).

(b) What amounts to a receipt? On this it is said that when the lien of the vendor has gone there has been receipt, and this is, generally speaking, correct (*l*). This may happen in many ways. Thus, if the goods be actually delivered to the buyer, or be taken by him, there is receipt; so also if they are delivered to an agent of the purchaser, or to a common carrier named by him. An agreement by the vendor to hold the property for the buyer, though actual possession is not altered, constitutes a receipt by the buyer—*e.g.*, in *Elmore* v. *Stone* (*m*), a purchaser left the purchased

(*g*) *Philips* v. *Bistolli* (1823), 2 B. & C. 511.

(*h*) *Hinde* v. *Whitehouse* (1806), 7 East, 558; *Gardner* v. *Grout* (1857), 2 C. B. (N.S.) 340.

(*i*) *Abbott & Co.* v. *Wolsey*, [1895] 2 Q. B. 97.

(*k*) *Taylor* v. *Smith*, [1893] 2 Q. B. 65.

(*l*) See *post*, p. 268.

(*m*) (1809), 1 Taunt. 458.

horse at livery with the vendor, and it was held that he had received it. So, if third parties (*e.g.*, wharfingers) hold the goods, if the vendor and purchaser agree together that they are for the future to be held for the latter, receipt by him takes place ; if this third party is a bailee, or other agent, his consent is necessary ; if he is not, the mere putting the goods at the purchaser's disposal is sufficient (*n*).

It may happen that the things sold are at the time in the possession of the buyer himself—*e.g.*, an agent may desire to purchase the goods in his own possession. Notwithstanding this, there can be receipt by him, and any act done by him which is inconsistent with his rights under his former kind of possession will amount to a receipt (*o*).

Value of £10 *or Upwards.*—If the value is actually over £10 the statute applies, though at the time of contract the value was uncertain and was left for future consideration. If the transaction as a whole involves goods beyond this value, the fact that individual items are below it, will not affect the case. Thus, if one goes into a shop and buys various articles, the value of which in the aggregate amounts to, say, £10 10*s.*, the contract is within the section of the statute (*p*).

The Memorandum in Writing.—This has already been dealt with, *ante*, pp. 6 *et seq.*

(*n*) *Bentall* v. *Burn* (1824), 3 B. & C. 423 ; *Tansley* v. *Turner* (1835), 2 Bing. N. C. 151.

(*o*) *Edan* v. *Dudfield* (1841), 1 Q. B. 302.

(*p*) *Baldey* v. *Parker* (1823), 2 B. & C. 37.

RIGHTS AND DUTIES.

(i) The Rights of the Buyer.

The rights of each party correspond to the duties of the other ; it suffices, therefore, to deal with the rights of each. The buyer's rights fall under two heads : he is entitled to delivery, and he is entitled to have any conditions and warranties observed.

Delivery.

Delivery is defined in the Act as the "voluntary transfer of possession from one person to another" (*q*). The vendor must make this delivery as in the contract of sale may have been agreed (*r*). Such delivery does not involve placing the buyer in actual possession ; it may be constructive—*e.g.*, the vendor may hold the property for the buyer, or may place the goods, or documents of title to them, at his disposal. If the goods are in the possession of a third person, there is no delivery by the seller to the buyer, unless and until such third person acknowledges to the buyer that he holds the goods on his behalf ; but this rule is not to affect the operation of the issue or transfer of any document of title to goods (*s*). The vendor must, in the absence of special agreement, deliver the goods upon payment or tender of the price (*t*), or if credit is allowed he must deliver at once ; but in the latter case, if the buyer becomes insolvent before he gets actual possession, the vendor may retain the goods (*u*), and as

(*q*) S. G. A., s. 62.
(*r*) *Ibid.*, s. 27.
(*s*) *Ibid.*, s. 29 (3).
(*t*) *Ibid.*, s. 28.
(*u*) *Bloxam* v. *Sanders* (1825), 4 B. & C., at p. 948 ; and see *post*, "Lien" and "Stoppage *in Transitu*," pp. 267 *et seq.*

to future deliveries, Mellish, L.J., said: "The seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract, until the price of the goods not yet delivered is tendered to him" (*x*).

Though the vendor is bound to deliver, he cannot, in the absence of agreement to do so, be compelled to carry or send the goods to the buyer. Delivery takes place if the vendor allows the goods to be taken; but it is often agreed that the vendor is to bring the goods to the buyer, in which case the special terms agreed upon must be fulfilled. Authorised delivery to a common carrier is primâ facie delivery to the buyer (*y*), but if the seller agrees to deliver at a fixed place, the carrier who takes the goods there is agent for him, and there is no delivery till their arrival (*z*).

Where goods are delivered at a distant place deterioration necessarily incident to the course of transit will fall on the buyer, though the seller agrees to deliver at his own risk (*a*), but loss caused by neglect of ordinary precautions by the seller must be made good by him (*b*); thus damage resulting from omission to make a proper contract with the carrier will primâ facie fall on the seller (*c*).

(*x*) *Ex parte Chalmers* (1873), 8 Ch. 291. Delivery may be due conditionally. In that case the party who desires to enforce it should give notice of the fulfilment of the condition (*Armitage* v. *Insole* (1849), 14 Q. B. 728).

(*y*) S. G. A., s. 32 (1).

(*z*) *Dunlop* v. *Lambert* (1838), 6 Cl. & F. 600, 621.

(*a*) S. G. A., s. 33.

(*b*) *Clarke* v. *Hutchins* (1811), 14 East, 475.

(*c*) S. G. A., s. 32 (2). And when the goods are sent by sea the buyer is entitled to the opportunity to make any usual insurance (s. 32 (3)).

The place of delivery is, apart from any express or implied agreement, the seller's place of business, if he have one ; if not, his residence ; though if the goods sold be specific goods which to the knowledge of the parties when the contract is made are in some other place, then delivery should be made at the place where the goods are located at the time of sale (*d*). Where the seller is bound to send the goods to the buyer, and no time is fixed by the contract, he must deliver within a reasonable time (*e*). Demand or tender of delivery must be made at a reasonable hour ; what is a reasonable hour is a question of fact (*f*).

When delivery is made it must be of the exact quantity, and, if too much or too little, the buyer may return the whole. In *Hart* v. *Mills* (*g*), two dozen of wine were ordered, four dozen sent ; it was held that the whole four dozen could be returned. The buyer may retain the goods included in the contract, or he may accept the whole delivery. In this case there is virtually a new contract, and he must pay for the goods delivered in excess at the contract rate (*h*). Frequently the contract, in naming the quantities, includes some such expression as "say about," "more or less," etc., and the effect of this is to allow in favour of the seller a reasonable variation between the contract quantity and the amount delivered. Each case stands by itself, but the following are fair examples. In *McConnel* v. *Murphy* (*i*) the contract was for "all the spars manufactured by X., say about 600, averaging sixteen inches" ; 496 were tendered of the specified kind

(*d*) S. G. A., s. 29 (1).
(*e*) *Ibid.*, s. 29 (2).
(*f*) *Ibid.*, s. 29 (4).
(*g*) (1846), 15 M. & W. 85.
(*h*) S. G. A., s. 30.
(*i*) (1874) L. R. 5 P. C. 203.

and measurement, and the tender was held good. In *Morris* v. *Levison* (*k*), the contract was for "a full and complete cargo, say 1,100 tons"; the vessel would take 1,210 tons, and only 1,080 were provided; it was decided that, under the circumstances, this would not suffice; on the other hand in *Miller* v. *Borner* (*l*), where the undertaking was to load a "cargo of ore, say about 2,800 tons," the charterer satisfied the contract by loading 2,840 tons, although the capacity of the ship was greater; the absence of the words "full and complete" leading to an opposite result.

In the absence of agreement to the contrary a buyer cannot be compelled to take delivery by instalments (*m*).

Conditions and Warranties.

Conditions and warranties are representations made in relation to the subject-matter of the contract. A condition is a representation that a thing is, or that a thing shall be, on the truth of which the existence of the contract may depend, and it gives a right of rescission to the injured party if it be falsified. A warranty is an agreement collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (*n*).

It is not every representation relating to the subject-matter of the sale, which amounts either to a condition or to a warranty. Mr. Chalmers, in his book on the

(*k*) (1876), 1 C. P. D. 155.
(*l*) [1900] 1 Q. B. 691; 5 Com. Cas. 175.
(*m*) S. G. A., s. 31 (1).
(*n*) *Ibid.*, s. 62.

Sale of Goods Act (*o*), points out five distinct forms of representation—viz., (1) a mere expression of opinion or mere commendation by the seller of his wares, which gives no right of action to the person deceived ; (2) a warranty ; (3) a condition ; (4) a representation made before the formation of the contract, and which is false and fraudulent, giving the aggrieved party a right to damages, and in many cases to rescission ; (5) a representation creating an estoppel, the truth of which, therefore, may not be denied by the maker.

Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract (*p*), but a stipulation as to time of payment is not a condition unless a different intention appears from the terms of the contract (*q*) ; a stipulation may be a condition, though the parties have in the contract termed it a warranty (*p*).

Conditions.—These may be express or may be implied. Express conditions are those which the parties make in so many words (*r*) ; implied conditions being such as the law incorporates into the contract unless the parties stipulate to the contrary. Conditions which are usually implied may be expressly disclaimed by agreement (*s*), or they may be impliedly waived. Thus, when the express terms are inconsistent with the existence of conditions usually implied, the implication is defeated (*t*). So also custom may negative a con-

(*o*) Pages 35, 36 (7th ed.).

(*p*) S. G. A., s. 11 (b). (*q*) *Ibid.*, s. 10.

(*r*) By agreement goods may be sold with a condition that the buyer shall not resell below a minimum price ; but such a condition cannot be attached to goods so as to bind subsequent purchasers merely having notice of it (*McGruther* v. *Pitcher*, [1904] 2 Ch. 306).

(*s*) S. G. A., s. 55. (*t*) *Ibid.*, s. 14 (4).

dition usually implied (*s*). On the other hand, custom may annex an implied warranty or condition (*u*).

Implied Conditions.—The ordinary rule is that conditions and warranties are not implied; the buyer must make express stipulations, or take his chance: *caveat emptor*. But there are many important exceptions to this provided by the Sale of Goods Act, 1893, viz.:

(a) *Condition of Title.*—The seller impliedly undertakes that, in the case of a sale, he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell them at the time when the property is to pass (*x*).

(b) *On Sale of Goods by Description.*—There is an implied condition that the goods shall correspond to the description, and if the sale was also by sample, a condition that the bulk shall correspond to such description, whether it corresponds with the sample or not (*y*). Thus in *Nichol* v. *Godts* (*z*), "refined foreign rape oil, warranted only equal to samples," was sold; the oil, though equal to samples, was not "refined foreign rape oil," and the court decided that the condition was unsatisfied. It may in some cases be difficult to distinguish a description from a warranty, but in all cases where the purchaser has not seen the goods and buys them relying on the description alone, whether the goods be specific or unascertained, there is a "contract for the sale of goods by description" (*a*).

If goods are bought by description from a seller who deals in goods of that description (whether he be a

(*u*) S. G. A., s. 14 (3).
(*x*) *Ibid.*, s. 12 (1).
(*y*) *Ibid.*, s. 13.
(*z*) (1854), 10 Exch. 191.
(*a*) *Varley* v. *Whipp*, [1900] 1 Q. B. 513.

manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed (*b*). The buyer is not bound to incur any expense in order to make the goods merchantable (*c*).

(c) *Goods Wanted for a Particular Purpose.*—Where the buyer expressly or by implication makes known to the seller the particular purpose for which goods are required, so as to show he relies on the seller's skill or judgment (except in the cases mentioned below), and the seller, in ordinary course, is accustomed to sell goods of the description in question, there is implied a condition that they are reasonably fit for the intended purpose (*d*). "A manufacturer, who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view" (*e*). Thus in *Drummond* v. *Van Ingen* (*f*), cloth manufacturers obtained an order to make worsted coatings of a weight and quality equal to sample, and they knew these were intended to be re-sold to tailors. The stuff supplied was equal to sample, but being "slippery," it was unmerchantable for the purpose for which it was intended to be used ; this defect not being discoverable by any ordinary or usual examination of the sample, the buyers were allowed to refuse the goods.

(*b*) S. G. A., s. 14 (2). See *Wren* v. *Holt*, [1903] 1 K. B. 610.
(*c*) *Jackson* v. *Rotax Motor, etc. Co.*, [1910] 2 K. B. 937.
(*d*) S. G. A., s. 14 (1).
(*e*) Lord MACNAGHTEN in *Drummond* v. *Van Ingen* (1887), 12 App. Cas., at p. 295.
(*f*) (1887), 12 App. Cas. 284.

The particular purpose for which the goods are required may be made known to the seller by the recognised description of the article, if that description points to one particular purpose only (*g*). The implied condition extends to latent defects, *e.g.*, where milk contains disease germs, the existence of which can only be discovered by prolonged examination (*h*). The rule is subject to the following exceptions, and there is no implied condition as to quality or fitness : (i) if the purchaser relies upon his own judgment, and not upon that of the seller ; and (ii) on the sale of a specified article under its patent or trade name (*i*). However, even in the latter case the condition implied by s. 14 (2) (*k*) applies, and the goods must be merchantable (*l*). A "trade name" must be acquired by user, and the question whether it has or has not been so acquired is one of fact (*l*).

(i) *Sale by Sample.*—There is an implied condition (1) that the bulk shall correspond with the sample in quality (*m*) ; (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample (*m*) before acceptance (*n*) ; and (3) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (*m*). Sale by sample does not of necessity take place whenever a

(*g*) *Priest* v. *Last*, [1903] 2 K. B. 148.
(*h*) *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608.
(*i*) S. G. A., s. 14 (1).
(*k*) *Ante*, pp. 257, 258.
(*l*) *Bristol Tramways* v. *Fiat Motors*, [1910] 2 K. B. 831.
(*m*) S. G. A., s. 15 (2).
(*n*) Place of delivery is, primâ facie, the place of inspection (*Perkins* v. *Bell*, [1893] 1 Q. B. 193.

sample is shown; sale by sample takes place when there is a term in the contract, express or implied, to that effect (*o*); the whole of the circumstances must be looked to. "The office of the sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country" (*p*).

Warranties.—A warranty, like a condition, may be express or implied, and if express may be made at the time of making the contract of sale, or afterwards, but, subject to this, that if the warranty be made after the completion of the contract, it is in itself a contract, and requires either to be under seal or to be given for good consideration (*q*). If the contract itself be reduced into writing, a representation intended to amount to a

(*o*) S. G. A., s. 15 (1).

(*p*) Lord MACNAGHTEN in *Drummond* v. *Van Ingen* (1887), 12 App. Cas., at p. 297. See also *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438.

(*q*) *Roscorla* v. *Thomas* (1842), 3 Q. B. 234.

warranty and made contemporaneously, cannot be given in evidence unless it be in writing (*r*).

Implied warranties are the exception, the rule being *caveat emptor*, and even when warranties are implied by law, the implication may (as in the case of a condition) be rebutted by the usage of trade or the agreement of the parties (*s*), and any express warranty inconsistent with any implied warranty will negative the latter (*t*).

The warranties implied under the provisions of the Sale of Goods Act, 1893, are the following: (i) An implied warranty that the buyer shall have and enjoy quiet possession of the goods (*u*); (ii) an implied warranty that the goods are free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made (*x*).

Under certain other Acts the implication of warranty is enacted. Amongst these may be noted the Merchandise Marks Act, 1887 (*xx*), which by s. 17 provides that "on the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in

(*r*) *Harnor* v. *Groves* (1855), 15 C. B. 667. This decision does not affect any right the buyer may have to recover damages for fraud or to rescind.

(*s*) S. G. A., s. 55.

(*t*) *Ibid.*, s. 14 (4).

(*u*) *Ibid.*, s. 12 (2).

(*x*) *Ibid.* s. 12 (3).

(*xx*) 50 & 51 Vict. c. 28. See also *post*, pp. 593—595.

some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee." Amongst other statutes providing for implied warranties with regard to certain classes of goods are the Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 2, and the Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 1.

Apart from warranty, a person selling goods he knows to be dangerous, in cases where the buyer would presumably be ignorant of the danger, is under a duty to warn the buyer that special care is necessary, and in default of so doing, the seller will be liable in damages if injury results (*y*). The remedies for breach of warranty and breach of condition are dealt with, *post*, pp. 264, 265.

Rights upon Breach of the Contract (*z*).

Remedy for Non-delivery—When the property in the goods has not passed to the buyer (*a*), his remedy for non-delivery is an action for damages, and the damages will be the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract (*b*). Where there is an available market for the goods in question the buyer is primâ facie entitled to recover the difference between the contract price and the market price at the time when they ought to have been delivered, or, if no time was fixed, at the time of the refusal to deliver (*c*); but the purchaser is only entitled to indemnity against loss (*cc*).

(*y*) *Clarke* v. *Army and Navy, etc. Society*, [1903] 1 K. B. 155.

(*z*) See the remarks on "BREACH OF CONTRACT," *ante*, pp. 71 *et seq.*, which are, in the main applicable to the present subject.

(*a*) See *post*, p. 278.

(*b*) S. G. A., s. 51 (1), (2). (*c*) *Ibid.*, s. 51 (3).

(*cc*) *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A. C. 301.

If the property in the goods has passed, the buyer can sue for wrongful detention and for damages for the loss suffered owing to deprivation of the chattel. The buyer cannot demand compensation for extraordinary loss, unless the other party had notice of special facts, which rendered the loss the likely result of failure to deliver (*d*). In *Horne* v. *Midland Rail. Co.* (*e*), the plaintiff had an order to fulfil, for which, if completed by a certain day, he was to receive an extraordinary price ; he gave notice to the defendants that the goods would be thrown on his hands if not delivered by a certain day, but he did not inform them that there was anything exceptional in the nature of the contract ; owing to the default of the defendants, the goods did not arrive, and it was held that the measure of damages was the ordinary and not the extraordinary loss. But if the vendor fails to deliver in accordance with contract, goods which he knew were required to carry out a sub-contract, and the buyer becomes thereby unable to carry out the same, the latter is entitled to recover from the vendor his costs, etc. of reasonably defending an action against him by the sub-purchaser (*f*).

If the seller refuses to deliver, the buyer may bring his action at once without waiting until the time fixed for delivery (*g*). If the agreement was to deliver by stated instalments, to be separately paid for, and the

(*d*) *Cory* v. *Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181.

(*e*) (1873), L. R. 8 C. P. 131. This was not a case of sale, but the principle applies. See also *ante*, p. 79.

(*f*) *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413. See also *Hammond* v. *Bussey* (1888), 20 Q. B. D. 79, where the buyer recovered like damages for defective quality.

(*g*) *Ante*, pp. 75, 76.

seller fails to deliver one or more instalments, it is in each case a question depending on the terms of the contract, whether the buyer is entitled to repudiate the contract, or has merely a right to damages (*h*).

Specific Performance.—Where chattels are unique or of peculiar importance, the court, on the buyer's application, may order specific performance of a contract to deliver them; the judgment to this effect may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just (*i*).

Breach of Condition.—Unless the buyer waives the condition, the breach of it entitles him to at once rescind the contract, or he may, at his option, treat it as a breach of warranty, and claim damages (*k*). But in two cases the breach of condition must be treated as a breach of warranty unless there be a term of the contract, express or implied, to the contrary—viz., (i) if the contract is not severable and the buyer has accepted the goods or part of them; or (ii) if the contract is for specific goods the property in which has passed to the buyer (*l*).

Breach of Warranty.—The buyer may not on account of this repudiate the contract, but he may (i) set up the breach of warranty in diminution or extinction of the price, and (ii) he may bring an action against the seller, and claim damages for the breach. The measure of damages for breach of

(*h*) S. G. A., s. 31 (2). And see *ante*, pp. 72, 73.
(*i*) *Ibid.*, s. 52.
(*k*) *Ibid.*, s. 11 (1). (*l*) S. G. A., s. 11 (1) (c).

warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty (*m*). In *Bostock & Co., Limited* v. *Nicholson & Sons, Limited* (*n*), the plaintiffs claimed damages against the defendants for breach of warranty in not supplying sulphuric acid commercially free from arsenic. The acid, which contained arsenic in large quantities, was used by the plaintiffs in the manufacture of brewing sugar, which the plaintiffs sold to brewers. In consequence of the poisonous nature of the sugar, the plaintiffs became liable to pay damages to the brewers and the goodwill of their business was entirely destroyed. The plaintiffs recovered as damages, under sub-s. (2) of s. 53, (i) the price paid for the impure acid; (ii) the value of the goods spoilt by being mixed with it. The other heads of damage were held not to fall within the measure laid down by the sub-section.

In the case of breach of warranty of quality, primâ facie the measure of damages is the difference between the value of the goods at the time of delivery to the buyer, and the value they would have had if they had answered the warranty (*o*).

(ii) Rights of the Seller.

The seller is entitled to be paid (*p*), and is entitled to have the goods accepted (*q*), provided, however, that if the buyer has not previously examined the goods, he

(*m*) S. G. A., s. 53 (2).
(*n*) [1904] 1 K. B. 725.
(*o*) S. G. A., s. 53 (3).
(*p*) See "PAYMENT," *ante*, p. 58.
(*q*) "Acceptance" to satisfy, s. 4 (*ante*, pp. 246—250), is not the same thing as "acceptance" which compels the buyer to keep the goods.

is not bound to accept them until he has had a reasonable opportunity of examining them to see if they are in accordance with the contract (*r*). A buyer accepts goods when either (i) he intimates to the seller that he accepts them, or (ii) when, after delivery of the goods to him, he does any act in relation to them which is inconsistent with the ownership of the seller, or (iii) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them (*s*). Under ordinary circumstances a seller cannot compel the buyer to return rejected goods; he is entitled only to notice of the rejection (*t*). If the contract is broken by the buyer, the seller acquires other rights—viz., the right to bring an action against the buyer, and, in some cases, rights against the goods.

(a) *Actions against the Buyer.*

If the property in the goods has passed to the buyer (*u*), the seller may, if the buyer makes default in payment, bring an action for the price (*x*), or, if the buyer neglects or refuses to accept, he may bring an action for damages for not accepting the goods (*y*); if the property in the goods has not passed to the buyer, the action which usually lies, is one for not accepting (*y*). To this latter statement there is an exception—viz., that where the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may maintain an action for the price, although

(*r*) S. G. A., s. 34.
(*s*) *Ibid.*, s. 35.
(*t*) *Ibid.*, s. 36.
(*u*) *Post*, p. 278.
(*x*) S. G. A., s. 49 (1).
(*y*) *Ibid.*, s. 50 (1).

the property in the goods has not passed, and the goods have not been appropriated to the contract (*z*). The damages for non-acceptance will be such as directly and naturally result in the ordinary course of events from the breach, and, where there is an available market for the goods in question, the measure of damage is primâ facie to be ascertained by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted (*a*).

When the seller is ready to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods (*b*).

Where the contract is to deliver by stated instalments, refusal to accept or to pay for one or more instalments may entitle the seller to treat the contract as at an end, and sue as for a total breach, or it may give a right to sue only for damages arising from the particular default; the right of the seller in this respect depends upon the terms of the contract in each particular case (*c*).

(b) *Remedies against the Goods.*

The rights of an "unpaid seller" (*d*) against the goods are—(i) Lien; (ii) Stoppage *in transitu*.

(*z*) S. G. A., s. 49 (2).
(*a*) *Ibid.*, s. 50.
(*b*) *Ibid.*, s. 37.
(*c*) *Ibid.*, s. 31 (2).
(*d*) An "unpaid" seller is, for the purposes of the present part of the subject, one to whom the whole price has not been paid or

Lien is the right which a creditor has to hold goods of which he has possession, but not ownership, when the price has not been paid (*e*). If the property in the goods has not passed to the buyer, the unpaid seller has not a right of lien, but a right of withholding delivery, similar to and co-extensive with lien (*f*).

The unpaid seller may retain possession of the goods until he is paid or tendered the price in the following cases—viz., (i) where the goods have been sold without any stipulation as to credit ; (ii) where the goods have been sold on credit, but the term of credit has expired ; (iii) where the buyer becomes insolvent (*g*)—*i.e.*, when he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due (*h*). And if the goods have been part delivered, the unpaid seller may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien (*i*). It has been decided that if the seller breaks his contract whilst the buyer is solvent, that even then he will be entitled to retain the goods if the buyer subsequently becomes insolvent (*j*).

Lien is lost if (i) the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal ; or (ii) if the buyer or his agent lawfully obtains

tendered, or who has been conditionally paid by means of a negotiable instrument, which has been subsequently dishonoured (S. G. A., s. 38 (1)). "Seller" includes any person in the position of a seller—*e.g.*, agent for the seller to whom the bill of lading has been indorsed (*ibid.*, s. 38 (2)).

(*e*) S. G. A., s. 39 (1). And see *post*, p. 474.
(*f*) *Ibid.*, s. 39 (2).
(*g*) *Ibid.*, s. 41.
(*h*) *Ibid.*, s. 62.
(*i*) *Ibid.*, s. 42.
(*j*) See *Valpy* v. *Oakeley* (1851), 16 Q. B. 941.

possession of the goods : or (iii) if the seller waives his lien (*k*).

Stoppage in transitu differs from *lien* chiefly in two points : (i) it can be exercised only when the buyer is insolvent ; and (ii) only when the goods have left the possession of the seller. It is the right conferred on the unpaid seller who has parted with goods to stop them, on insolvency of the buyer, before they have reached the buyer's actual or constructive possession, and to resume possession until they are paid for, so as to put himself in the same position as if he had not parted with them (*l*).

The general result of the stoppage is to restore the right of possession to the vendor ; to place him, in fact, in a position similar to that which he has lost by parting with the goods. The sale is not thereby rescinded (*m*). "If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury [the buyers] sustain by such wrongful sale, and recover damages to the extent of that injury ; but they can maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights" (*n*).

The right is more than a mere lien ; "it grows out of [the vendor's] original ownership and dominion. . . . If goods are sold on credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at

(*k*) S. G. A., s. 43. (*l*) *Ibid.*, s. 44.

(*m*) *Ibid.*, s. 48 (1) ; and see notes to *Lickbarrow* v. *Mason* (1793), 1 Sm. L. C. (11th ed.), 693.

(*n*) BAYLEY, J., in *Bloxam* v. *Sanders* (1825), 4 B. & C. 941.

once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession" (*o*). The vendor's right is superior even to that of a judgment creditor who has attached the goods (*p*).

The right can be exercised only against an insolvent buyer, the insolvency being a matter to be determined on the facts (*q*). The vendor may take time by the forelock, and stop the goods before actual insolvency; but if, at the termination of the voyage, or at the date when delivery is due, the buyer proves solvent, the vendor must deliver, and may further be liable for expenses (*r*).

It is only during transitus that this right of stoppage exists; it is therefore important to define when the transitus begins and when it ends. It is provided by the Act that goods shall be deemed to be *in transitu* from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee (*s*).

In every case an inquiry must be made into the particular facts, as the question is really one of the intention of the parties (*t*); *e.g.*,—

Goods delivered to a carrier *quâ* carrier—transitus continues.

(*o*) See note (*n*), *ante*, p. 269.

(*p*) *Smith* v. *Goss* (1807), 1 Camp. 282.

(*q*) "Insolvency" is defined, *ante*, p. 268.

(*r*) *The Constantia* (1807), 6 Rob. Ad. R. 321.

(*s*) S. G. A., s. 45 (1).

(*t*) See remarks of JESSEL, M.R., in *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* (1877), 5 Ch. D. 205, 219; and of MATHEW, J., in *Bethell* v. *Clark* (1887), 19 Q. B. D. 558.

Goods delivered to a carrier *quâ* warehouseman for the buyer—transitus ends. But not until the carrier acknowledges to the buyer or his agent that he holds for him (*u*).

Goods delivered to the buyer's servant—transitus ends.

Goods delivered to the master of the buyer's ship—transitus ends. If the goods are delivered to a ship chartered by the buyer, it is a question depending on the facts of each particular case whether they are in the possession of the master as a carrier, or as agent for the buyer (*x*).

When the buyer takes possession of the goods away from the carrier (*y*), even against the carrier's will, and though the destination is not reached (*z*) transitus ends.

When the carrier or bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf—transitus ends (*a*).

If the buyer or his agent in that behalf takes possession of part of the goods, the circumstances being such as to show an intention on the part of the vendor to retain the rest, the right to stop *in transitu* as to these remains ; if such as to show an agreement to give up possession of the rest, the right to stop has gone (*b*).

Two further points arise here—what is a sufficient taking possession ? and what is a destination ?

(*u*) S. G. A., s. 45 (3).

(*x*) *Ibid.*, s. 45 (5). (*y*) *Ibid.*, s. 45 (2).

(*z*) *London and North Western Rail. Co.* v. *Bartlett* (1862), 7 H. & N. 400 ; 31 L. J. Exch. 92.

(*a*) S. G. A., s. 45 (6). (*b*) S. G. A., s. 45 (7).

The buyer, according to one conception of constructive possession, has it immediately the goods are delivered to a common carrier, or to a special carrier named by him, but if this is possession, it is not such as to defeat the right of stoppage. For this there must be actual possession, or "another kind of constructive possession by the vendee—*i.e.*, when the goods have been delivered by the carrier, and have reached the hands of an agent to the vendee to be held at his disposal" (*c*). Actual possession raises no difficulty, but it is often hard to state whether a delivery is such as to give a constructive possession to the buyer. If it amounts to actual receipt within the meaning of s. 4 of the Sale of Goods Act such possession will arise. A leading case is that of *Whitehead* v. *Anderson* (*d*): there the assignee of the bankrupt buyer went on board a vessel on which was timber consigned to the buyer; he touched it and told the captain he was there to take possession of the cargo, but the captain did not assent to hold them on these terms. It was held that no constructive possession arose in the buyer, and that the right of stoppage did not cease. And generally, if the carrier does not hold the goods as agent for the consignee, owing further duties to him than those of a mere carrier, he cannot acquire possession for such consignee. If, however, he becomes, with his own consent, a storekeeper for the consignee, he can acquire such possession.

It is not difficult to say when the goods have reached their destination when they are sent direct between

(*c*) BRETT, L.J., in *Kendal* v. *Marshall* (1883), 11 Q. B. D. 356, 361.

(*d*) (1842), 9 M. & W. 518.

consignor and consignee, but there is more uncertainty when the goods, though not yet arrived at their ultimate point, have reached an intermediate place of rest—*e.g.*, A. sends goods to London to be forwarded to Hamburg : is London or Hamburg the destination ? In *Dixon* v. *Baldwen* (*e*), Lord ELLENBOROUGH stated that : "The goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary," and this he considered to mark an end to the transitus. Some recent cases illustrate the point and support the above test. In *Ex parte Miles* (*f*), an agent in England bought goods for a Jamaica firm, the vendors being aware of the residence of the firm. The agent asked the vendors to send the goods to certain shipping agents at Southampton for shipment by a certain vessel, and this was done. The "particulars for clearance" were sent, and the vendors asked the shipping agents to "*forward as directed.*" but the name of the consignee and the destination were communicated, not by the vendors, but by the buyer's agent, and the bills of lading described the latter as consignor. The court held, so far as related to the vendor's right of stoppage, that the transitus ended at Southampton. BRETT, M.R., said : "As a matter of business, it is impossible to say that [the shipping agents] could properly have shipped the goods for Jamaica without receiving further orders as to the person to whom they were to ship them. They were to receive directions from the purchasers as to the person to whom they were to ship them, and the

(*e*) (1804), 5 East, 175, 186. (*f*) (1885), 15 Q. B. D. 39.

purchasers were to communicate to them another substantive destination. . . . The case, therefore, seems to me to be within the authority of *Dixon* v. *Baldwen*" (*g*). So in *Kendal* v. *Marshall* (*h*), it was decided that where goods are sent by an unpaid vendor to a forwarding agent, who is instructed as to the ulterior destination by the buyer, the right of stoppage is lost when they reach the agent. On the other hand, in *Bethell* v. *Clark* (*i*), the buyers purchased goods of the vendors, who resided at Wolverhampton, and sent them a consignment note as follows: "Please consign the 10 hhds. hollow-ware to the *Darling Downs*, to Melbourne, loading in the East India Docks. To come up at once." The buyers became insolvent and the vendors stopped the goods, but not until they had been put on board the *Darling Downs*. The question arose, was the transit at an end? and the courts unanimously decided "No," Lord ESHER, M.R., laying down this principle: "Where the transit is a transit which has been caused either by the terms of the contract, or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract, or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone" (*k*).

(*g*) (1804), 5 East, 175; and see *Valpy* v. *Gibson* (1847), 4 C. B. 837.

(*h*) (1883), 11 Q. B. D. 356.

(*i*) (1887), 19 Q. B. D. 553; and (1888), 20 Q. B. D. 615.

(*k*) See also *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560; *Coates* v. *Railton* (1827), 6 B. & C. 422; *Lyons* v. *Hoffnung* (1890), 15 App. Cas. 391.

There is no particular form of procedure required in the exercise of the right. Simple notice to the carrier is enough, but it must be given to the person actually in possession (*e.g.*, the ship's master), or if to an employer of such person (*e.g.*, shipowner), then in time to allow, with the exercise of reasonable diligence, the person in charge to be communicated with (*l*), and it has been questioned whether or no there is any duty in the shipowner to communicate with the master (*m*).

Neither the right of lien nor the right to stop *in transitu* is defeated by any sale or other disposition of the goods which the buyer may have made without the seller's consent (*n*). But if a document of title to goods, *e.g.*, a bill of lading, has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to one who takes it in good faith and for valuable consideration, then if such transfer was by way of sale the right of lien and stoppage *in transitu* is defeated (*n*). The same effect is produced, whether the transfer be made by the vendee or by a mercantile agent, "entrusted with the bill of lading." A bonâ fide transfer by way of pledge of the document of title will defeat the right to a certain extent; the unpaid seller's right is subject to that of the bonâ fide transferee for value (*o*). If, therefore, the vendee retains any property in the goods, the vendor may exercise

(*l*) S. G. A., s. 46.

(*m*) *Ex parte Falk* (1880), 14 Ch. D. 446; 7 App. Cas. 573, 585.

(*n*) S. G. A., s. 47; *Lickbarrow* v. *Mason* (1793), 1 Sm. L. C. (11th ed.), p. 693; see also *Cahn* v. *Pockett's Bristol, etc. Co., Limited*, *ante*, p. 244.

(*o*) S. G. A., s. 47; *Lickbarrow* v. *Mason*, *supra*.

his right against this; *e.g.*, in *In re Westzinthus* (*p*), L. & Co. were indebted to H. & Co. to an amount of £9,271, and H. & Co. held as security a bill of lading and certain other property; L. & Co. became bankrupt, and the unpaid vendor stopped the goods; it was decided that after the payment of H. & Co. the stoppage was good, and that the vendor had a right to insist that H. & Co. should first be paid out of the security other than the goods represented by the bill of lading, and that in the case only of insufficiency of value of such other security should they resort to the security of the goods. In *Kemp* v. *Falk* (*q*), Lord BLACKBURN said: "The unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop *in transitu* everything which was not covered by that pledge. That was settled and has been considered law, or rather equity, ever since the case of *In re Westzinthus*, and has been affirmed in *Spalding* v. *Ruding*, and I have no doubt it is very good law upon that point."

So far has the vendor's right been taken, that it has been held that where goods have been sub-sold, but the bills of lading not actually transferred, if the transitus is not ended, the vendor may stop them (*r*). A somewhat bold extension of the vendor's rights was made in *Ex parte Golding, Davis & Co.* (*s*); in that case it was decided that the unpaid vendor might stop,

(*p*) (1834), 5 B. & Ad. 817.

(*q*) (1882), 7 App. Cas. 573; and see *Spalding* v. *Ruding* (1846), 6 Beav. 376; 15 L. J. Ch. 374.

(*r*) *Kemp* v. *Falk* (1882), 7 App. Cas. 573.

(*s*) (1880), 13 Ch. D. 628.

not the goods, but the unpaid purchase-money payable by the sub-purchaser to the vendee. This was approved by BRAMWELL, L.J. (*t*); but the principle involved in that decision cannot be considered as firmly established, and in the House of Lords, Lord SELBORNE said: "I assent entirely to the proposition that where the sub-purchasers get a good title as against the right of stoppage *in transitu*, there can be no stoppage *in transitu* as against the purchase-money payable by them to their vendor; at all events, until I hear authority for that proposition, I am bound to say that it is not consistent with my idea of the right of stoppage *in transitu* that it should apply to anything except to the goods which are *in transitu*" (*u*).

Re-sale of Goods subjected to Lien or Stoppage in Transitu.

As the contract of sale is not usually rescinded by the exercise of the right of lien or of stoppage *in transitu*, it follows that, as a rule, re-sale is not allowable. But if, notwithstanding this, the unpaid seller re-sells, the new buyer acquires a good title as against the original and defaulting buyer (*x*). In certain cases the unpaid vendor is entitled to re-sell, viz., (i) where the right was expressly reserved in the contract of sale (*y*); (ii) where the goods are perishable (*z*); or (iii) where the unpaid seller gives notice to the buyer of his intention

(*t*) *Ex parte Falk* (1880), 14 Ch. D. 457.

(*u*) (1882), 7 App. Cas., at p. 577. The remainder of the opinion is especially worth reading, as being an authoritative statement on this question.

(*x*) S. G. A., s. 48 (2).

(*y*) *Ibid.*, s. 48 (4).

(*z*) *Ibid.*, s. 48 (3).

to re-sell, and the buyer does not, within a reasonable time, pay or tender the price (*z*). In these cases the seller may re-sell and claim damages for breach of contract.

Transfer of the Property.

It is often necessary to determine at what exact point of time the property in goods passes to the purchaser, and more especially as, in the absence of agreement to the contrary, and where neither party is in default, the risk, as a rule, lies on the owner : *res perit domino* (*a*). The cardinal question when the goods are specific or ascertained is, what is the intention of the parties? If an answer to this can be obtained, the time when the property passes is fixed by that answer, for the intention of the parties governs the matter (*b*) : and where that intention does not otherwise appear, the following are rules for ascertaining it :

Sale of Specific Chattels.—(i) When a given specified thing is sold unconditionally and in a deliverable state (*c*), the property passes to the buyer at the time of sale ; *e.g.*, if I go to a shop and buy a certain book, on the completion of the bargain the book is mine (*d*). The seller may be entitled to retain the thing sold until he receives the price, but this right arises from lien, and not from any right of property. "Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that

(*z*) S. G. A., s. 48 (3).

(*a*) *Ibid.*, s. 20. (*b*) *Ibid.*, s. 17 (1).

(*c*) That is, state in which the buyer is bound to accept (*ibid.*, s. 62 (4)).

(*d*) *Ibid.*, s. 18, r. 1.

specific chattel, and to pay the stipulated price, the parties are then in the same position that they would be after a delivery of goods in pursuance of a general contract" (*e*). Thus, A. bought a given stack of hay for a sum payable on a future occasion; and it was held to be a sale passing the immediate property (*f*). The practical result of this would be that the hay would remain at the risk of the purchaser, though in the absence of special agreement he could not remove it until he had paid the price.

(ii) When the goods are sold specifically, but the seller is bound to do something to them for the purpose of putting them into that state in which the purchaser is to be bound to accept them, that is, into a deliverable state, in the absence of circumstances indicating a contrary intention, the property does not pass until such thing be done, and the buyer has notice thereof (*g*).

For instance, if the seller is to deliver the goods at a particular place, the property passes only when they are delivered there (*h*). So, also, if the thing sold, though specified, is not yet in existence, or is only partially finished, *e.g.*, a thing to be made to order, the buyer obtains the proprietorship only on completion (of course, in the absence of agreement, express or implied, to the contrary); *e.g.*, in *Clarke* v. *Spence* (*i*), B. agreed to build a ship, to be paid for by instalments at periods coincident with certain stages in its building.

(*e*) PARKE, J., in *Dixon* v. *Yates* (1833), 5 B. & Ad. 313, 340.

(*f*) *Tarling* v. *Baxter* (1827), 6 B. & C. 360.

(*g*) S. G. A., s. 18, r. 2.

(*h*) COCKBURN, C.J., in *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B. 322.

(*i*) (1836), 4 A. & E. 448.

Two instalments had been paid when B. became bankrupt, and the point at issue was, to whom did the vessel belong? And the court stated that "until the last of the necessary materials be added, the vessel is not complete, the thing contracted for is not in existence. . . . And we have not been able to find any authority for saying, that while the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in *Woods* v. *Russell*" (*k*). In this particular case it was decided that the payment by instalments evidenced an intention to take and give property in the thing, so far as it was constructed at the time of payment of each instalment. In a subsequent case, PARKE, B., said: "A chattel which is to be delivered *in futuro* does not pass by the contract" (*l*).

The rule under consideration applies only if the work to be done upon the thing is to be accomplished before delivery, *e.g.*, it will not apply if a vendor agrees to do certain repairs after delivery (*m*): and further, only if the something to be done is to be done by the vendor. An agreement by the buyer to do something to the goods—and such is conceivable—does not affect the passing of the property.

(iii) Where anything remains to be done to the goods, for the purpose of ascertaining the price, as by

(*k*) See this case, (1822), 5 B. & Ald. 943.

(*l*) *Laidler* v. *Burlinson* (1837), 2 M. & W. 602. And when there is a question whether the case is one of sale or work, see *Anglo-Egyptian Navigation Co.* v. *Rennie* (1875), L. R. 10 C. P. 271.

(*m*) See *Greaves* v. *Hepke* (1818), 2 B. & Ald. 131.

weighing, measuring, or testing the goods, where the price is to depend upon the quantity or quality of the goods, the performance of these things with notice to the buyer shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted (*n*).

This refers most probably to any weighing or measuring by the vendor, and is thus a particular case of rule (ii) ; *e.g.*, in *Simmons* v. *Swift* (*o*), a specified stack of bark was sold at £9 5*s.* per ton, and a portion thereof was weighed and taken away ; it was decided that the property in the remainder had not passed because it was to be weighed, and "the concurrence of the seller in the act of weighing was necessary." But in *Furley* v. *Bates* (*p*), the buyer was to weigh the goods at his own expense, at a machine past which they would be taken in transit : and it was decided that here the property did pass, and an opinion was expressed that if the weighing or measuring was to be done by the buyer, the property would, as a matter of law, always pass.

(iv) Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass till the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer ; *e.g.*, if payment and delivery are to be concurrent and by mistake goods are

(*n*) S. G. A., s. 18, r. 3.
(*o*) (1826), 5 B. & C. 857.
(*p*) (1865), 2 H. & C. 200.

delivered before payment, the goods may be demanded back (*q*).

(v) When goods are delivered to the buyer on "approval" or on "sale or return" the property in them passes to the buyer when (1) he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; or (2) if without giving notice of rejection he retains the goods beyond a time fixed by agreement or beyond what, in view of all the facts, is a reasonable time (*r*).

If the buyer pledges the goods, he does an "act adopting the transaction" (*s*), but the property will not pass if the goods are fraudulently pledged by a person to whom the buyer has delivered them for a special purpose which is consistent with the terms of his contract and the ownership of the seller (*t*).

Sale of an Unspecified Chattel.—The contract is here merely an executory agreement, and until the goods are ascertained (*u*) the property does not pass. Such cases will include those which were described as "a bargain for a certain quantity, *ex* a greater quantity" (*x*); *e.g.*, sale of so many tons of hay out of a certain year's produce. But where the goods have been chosen out of the bulk, and being in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, that which was

(*q*) *Per* BAYLEY, J., in *Bishop* v. *Shillito* (1819), 2 B. & Ald. 329 n.
(*r*) S. G. A., s. 18, r. 4.
(*s*) *Kirkham* v. *Attenborough*, [1897] 1 Q. B. 201.
(*t*) *Weiner* v. *Gill*, [1905] 2 K. B. 172; [1906] 2 K. B. 574.
(*u*) S. G. A., s. 16.
(*x*) *Gillett* v. *Hill* (1834), 2 C. & M. 530.

formerly a mere agreement to sell becomes an actual sale, and the property passes (*y*).

A question of some difficulty arises, when it is required to settle who has the right of appropriating—say, that A. orders of B. 500 pounds of a given kind of sugar, here it is usual for B. to select from the bulk the particular portion of sugar bought, but it is not always so easy to determine. BLACKBURN lays down this rule (*z*): "When from the nature of an agreement an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; when once he has performed the act, the choice has been made and the election irrevocably determined, but till then he may change his mind"; *e.g.*, if the purchaser is to send for and take away a certain number of bricks out of a stack, as he cannot do this until appropriation, he has the right to select; if the seller is to send them, he has the right of appropriation.

In *Calcutta Co.* v. *De Mattos* (*a*), coals were to be delivered by the defendant at Rangoon, and for that purpose were shipped from London to that port; in accordance with his contract, he gave the bill of lading and the policy of insurance to the company. Lord BLACKBURN said: "As soon as De Mattos, in pursuance of the stipulations, gave the company the policy and bill of lading, he irrevocably appropriated to this contract the goods that were thus shipped. . . . So that from that time what had originally been an agreement to

(*y*) S. G. A., s. 18, r. 5.
(*z*) Blackburn on Sales (3rd ed.), p. 139.
(*a*) (1863), 32 L. J. Q. B. 322.

supply any coals answering the description became an agreement relating to those coals only, just as much as if the coals had been specified from the first."

The above rules are those that generally prevail, but in many instances they are passed over in accordance with the intention of the contractors. "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing [an intention] this intention is effectual" (*b*). In *Young* v. *Matthews* (*c*), a purchaser of bricks sent his agent with an order for delivery, and the vendor's foreman declared his intention of delivering whenever he could get rid of a man who was in possession under a distress; he then pointed to various clumps, consisting of bricks, some unfinished, some finished, and said that out of those the delivery should be made. It was decided, on these facts, that there had been a sufficient appropriation, and that the property had passed. ERLE, C.J., said: "The well-known general rule that the property does not pass to the buyer while anything remains to be done by the seller, either to complete the goods or to ascertain the price, does not therefore apply to the present case. There is no doubt that the parties could pass the property in all the bricks, whether finished or not, if such was their intention."

So if the vendor retains a *jus disponendi*, this will show an intention not to part with the property in the goods till the happening of some specified event (*d*), generally until payment of the price. If the bills of

(*b*) Lord BLACKBURN in *Calcutta Co.* v. *De Mattos, supra.* See *Castle* v. *Playford* (1872), L. R. 7 Ex. 98.

(*c*) (1867), L. R. 2 C. P. 127.

(*d*) S. G. A., s. 19.

lading are made deliverable to the consignor's order, the consignee does not get the property until the happening of something further (*e*); the consignor's absolute power of disposal is not lost, even if the consignee offers to accept bills or to pay the price (*f*). If a purchaser receives the bill of lading together with a bill of exchange for acceptance, this is evidence of intention on the part of the vendor not to part with the goods till acceptance of the bill (*g*); but upon acceptance of the bill or payment of the price, the property will vest in the buyer, the seller's conditional appropriation of the goods having thereby become unconditional (*f*).

Sales by Auction (*h*).

When goods are sold by auction each lot is primâ facie deemed to be the subject of a separate contract of sale. The sale is complete when the hammer falls, or as otherwise customary, and after that time the bid may not be retracted. The seller or his agent may bid, but only if an express notification to that effect is given; a contravention of this rule makes the sale fraudulent. The seller may notify that he has placed a reserve price on the goods (*h*).

(*e*) *Van Casteel* v. *Booker* (1848), 2 Exch. 691; and see *Wait* v. *Baker* (1848), 2 Exch. 1; *Turner* v. *Trustees of the Liverpool Docks* (1851), 6 Exch. 543.

(*f*) See cases in the last note, and also Cotton, L.J., in *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D. 164.

(*g*) S. G. A., s. 19 (3); *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116.

(*h*) S. G. A., s. 58. As to auctioneers, see *ante*, pp. 155—157.

NEGOTIABLE INSTRUMENTS.

A NEGOTIABLE instrument has been defined by his Honour Judge WILLIS, K.C., as "one the property in which is acquired by anyone who takes it bonâ fide, and for value, notwithstanding any defect of title in the person from whom he took it; from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument" (*i*). This definition involves the following characteristics of a negotiable instrument, viz.: (i) Property in it passes from hand to hand by mere delivery; (ii) the holder in due course is not prejudiced by defects of title of his transferor or of previous holders; (iii) he can sue in his own name; (iv) he is not affected by certain defences which might be available against previous holders, *e.g.*, fraud to which he is no party (*k*). This may be illustrated by examples: A. owes B. £500; he gives a written recognition of the debt—say the shortened form of acknowledgment known as an I. O. U. The debt evidenced by this cannot be handed on to C. so as to enable C. to sue on it, unless it be assigned in writing and unless A. receives a written notice of the transfer; even then any defence good against B., *e.g.*, no consideration, will be good against C. But if A. gives B.

(*i*) Willis on Negotiable Settlements (1st ed.), p. 6.

(*k*) See *per* BOWEN, L.J., in *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch., at p. 294.

a bill of exchange payable to bearer for £500, then when C. gets the bill from B. he can sue A. without giving special notice of the assignment, and if he is a holder in due course, he is not liable to be defeated by any defence personal to B., *e.g.*, fraud by B. in obtaining the bill from A.

The character of negotiability does not attach itself to every instrument, but only to those which have obtained it either by mercantile custom or statute. Whether or not a document is negotiable is in many cases a question of fact to be proved by evidence; in some cases instruments are, as a matter of law, recognised as negotiable. Bills of exchange, promissory notes (including bank notes), cheques, Exchequer bills, East India bonds (*l*), circular notes (*m*), dividend warrants, share warrants (*n*), debentures payable to bearer (*o*), and certain scrip and bonds, are negotiable. On the other hand, post office orders (*p*), share certificates and transfers (*q*), and the bulk of scrip and bonds, are not negotiable; an I. O. U. is not negotiable, nor usually is an ordinary letter of credit. Documents of title to goods have some of the characteristics of negotiability (*r*).

The list of negotiable instruments may increase, as the law recognises instruments as negotiable when they

(*l*) 51 Geo. 3, c. 64, s. 4.

(*m*) *Conflans Quarry Co.* v. *Parker* (1868), L. R. 3 C. P. 1; Chalmers (7th ed.), p. 351.

(*n*) *Webb, Hale & Co.* v. *Alexandria Water Co., Limited* (1905), 21 T. L. R. 572.

(*o*) See *post*, p. 296.

(*p*) *Fine Art Society* v. *Union Bank* (1886), 17 Q. B. D. 705.

(*q*) Chalmers on Bills of Exchange (7th ed.), p. 359; *Swan* v. *North British Australasian Co.* (1863), 32 L. J. Exch., at p. 278.

(*r*) See *ante*, pp. 275, 276, and *post*, p. 296.

are transferable by delivery and are regarded by custom as negotiable. A contrary practice would be "founded on the view that the law merchant . . . is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce" (*s*), and though the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, if a usage is once shown to be universal, effect will be given to it, though it may not have formed part of the law merchant as previously recognised and adopted by the courts (*t*). On the other hand, a contrary view was expressed in *Crouch* v. *The Credit Foncier* (*u*), but the decision of KENNEDY, J., in *Bechuanaland Exploration Co.* v. *London Trading Bank* (*x*), shows that the class of negotiable instruments may be enlarged by the growth of mercantile custom. It was held in that case, upon proof by evidence adduced in court of recent usage in the mercantile world, that debentures payable to bearer issued by an English company in England were negotiable instruments, and that *Crouch* v. *The Credit Foncier* was in effect overruled by *Goodwin* v. *Robarts*.

Negotiability of Bills of Exchange, Promissory Notes, Bank Notes, Exchequer Bills, and Cheques.—In *Goodwin* v. *Robarts* (*y*), COCKBURN, C.J., shows the origin

(*s*) *Goodwin* v. *Robarts* (1875), L. R. 10 Ex., at p. 346; 1 App. Cas. 476; *Simmons* v. *London Joint Stock Bank*, [1892] A. C. 201.

(*t*) *Goodwin* v. *Robarts* (1875), L. R. 10 Ex., at p. 356.

(*u*) (1873), L. R. 8 Q. B. 374.

(*x*) [1898] 2 Q. B. 658; 3 Com. Cas. 285; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144; 7 Com. Cas. 172. See further, *post*, p. 296.

(*y*) (1875), L. R. 10 Ex. 337, 346.

of the negotiable character of these instruments. He says: "Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and, still later, and but slowly, into England. . . . According to Professor Story, . . . 'the introduction and use of bills of exchange in England . . . seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom.' With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase," yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin* v. *Boure* (*z*), in the first of James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, *i.e.*, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on bills of exchange, recently published in Germany, states that the first-known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Savary . . . had assigned it to a later date, namely, 1620. From its obvious convenience, this practice speedily came into

(*z*) (1603), Cro. Jac. 6.

general use, and, as part of the general custom of merchants, received the sanction of our courts. At first, the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders and finally to bills of all persons whether traders or not. [See Chitty on Bills (8th ed.), p. 13.]

"In the meantime, promissory notes had also come into use, differing herein from bills of exchange, that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed, and for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange. In 1680, in the case of *Shelden* v. *Hentley* (*a*), an action was brought on a note under seal, by which the defendant promised to pay to bearer £100, and it was objected that the note was void, because not made payable to a specific person. But it was said by the court, '*Traditio facit chartam loqui*, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to *the bearer* of the note, any one that brings the note shall be paid.' JONES, J., said that 'It was the custom of merchants that made that

(*a*) (1681), 2 Show. 160.

good' (*b*) . . . In *Williams* v. *Williams* (*c*), where the plaintiff brought his action as indorsee as against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error, that the note having been made in London, the custom, if any, should have laid as the custom of London. It was answered 'that this custom of merchants was part of the common law, and the court would take notice of it *ex officio*, and therefore it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person *secundum usum et consuetudinem mercatorum*, drew the bill,' and the plaintiff had judgment.

"Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange, had received the sanction of the courts, but HOLT having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made

(*b*) See *Bromwich* v. *Lloyd* (1697), 2 Lutw. 1582.
(*c*) (1693), Carth. 269.

capable of being assigned by indorsement or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty. It is obvious from the preamble to the statute, which merely recites that '*it had been held* that such notes were not within the custom of merchants,' that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that, by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord HOLT.

"We now arrive at an epoch when a new form of security for money, viz., goldsmiths' or *bankers' notes*, came into general use. Holding them to be part of the currency of the country, as cash, Lord MANSFIELD and the Court of King's Bench had no difficulty in holding, in *Miller* v. *Race* (*d*), that the property in such a note passes, like that in cash, by delivery, and that a party taking it bonâ fide, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

"In like manner, it was held, in *Collins* v. *Martin* (*e*), that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

(*d*) (1791), 1 Burr. 452. (*e*) (1797), 1 B. & P. 648.

"Both these decisions, of course, proceeded on the ground that the property in the bank-note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made bonâ fide.

"A similar question arose in *Wookey* v. *Pole* (*f*), in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favour of blank or order, contained this clause, 'If the blank is not filled up, the bill will be paid to bearer.' Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiff's agent, had been deposited by him with the defendants on a bonâ fide advance of money. It was held by three judges of the Queen's Bench, BAYLEY, J., *dissentiente*, that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of HOLROYD, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. 'The courts,' he says, 'have considered these instruments either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal.' After referring to the authorities, he proceeds: 'These authorities show that not only money itself may pass, and the right to it may arise, by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in

(*f*) (1820), 4 B. & Ald. 1.

like manner, by currency or delivery. These decisions proceed upon the nature of the property (*i.e.*, money) to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it.'

"Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him to bearer, or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the courts have become fixed law. Thus while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer (*g*). Besides this, a custom has grown up amongst bankers themselves of marking cheques as good for the purposes of clearance,

(*g*) *Pott* v. *Clegg* (1847), 16 M. & W. 321.

by which they become bound to one another (*h*). . . . It thus appears that all these instruments, which are said to have derived their negotiability from the law merchant, had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of trade."

Negotiability of Bonds Payable to Bearer.—It has been decided in several cases that foreign bonds payable to bearer, the property in which passes by mere delivery, will be deemed negotiable by the English law, if it is the custom of the money market in England (*i*) to treat them as negotiable. The earliest leading case in which this was laid down was *Gorgier* v. *Mieville* (*k*)—a case dealing with Prussian Government bonds. This has been approved and followed on many subsequent occasions, *e.g.*, in *Goodwin* v. *Robarts* (*l*), in which it was decided that scrip to bearer for Russian bonds was by custom negotiable. The most authoritative of recent cases bearing on this topic is *London Joint Stock Bank* v. *Simmons*, in the House of Lords (*m*), in which certain Argentine bonds were treated as negotiable.

Negotiability of Dividend Warrants.—A dividend warrant has many of the characteristics of a cheque, and the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), provides that the rules relating to the crossing of cheques shall apply to dividend warrants (*n*), and

(*h*) As to the negotiability of cheques, see *McLean* v. *Clydesdale Banking Co.* (1884), 9 App. Cas. 95.

(*i*) *Picker* v. *London and County Bank* (1887), 18 Q. B. D. 515.

(*k*) (1824), 3 B. & C. 45.

(*l*) (1876), L. R. 10 Ex. 337; 1 App. Cas. 476.

(*m*) [1892] A. C. 201.

(*n*) Section 95.

that nothing in the Act shall affect the validity of any usage relating to dividend warrants or the indorsement thereof (*o*). The received opinion is that dividend warrants are negotiable (*p*).

Negotiability of Debentures.—The custom of merchants to treat debentures payable to bearer as negotiable has recently been recognised by the court, both in the case of English and foreign bonds, and judicial notice will now be taken of the fact that such bonds are negotiable. Accordingly, those debentures to which the custom applies must be considered as negotiable in the strict sense of the term (*q*).

Quasi-Negotiability of Bills of Lading.—According to the special verdict of the jury in *Lickbarrow* v. *Mason* (*r*), bills of lading, if drawn to order or assigns, are by the custom of merchants negotiable by delivery and indorsement for value, provided that the goods represented by the bills have been shipped and the voyage has not yet been completed nor delivery made; if the indorsement is in blank the holder is entitled to fill in the name, and thus put the bill on a negotiable footing. This statement of custom has been adopted by the court as law. If the bill is not drawn to "order or assigns" of the holder, it seems the bill is not negotiable (*s*). Nevertheless bills of lading, though

(*o*) Section 97 (3) (d).

(*p*) Chalmers on Bills of Exchange (7th ed.), p. 356.

(*q*) *Bechuanaland Exploration Co.* v. *London Trading Bank, Limited*, [1898] 2 Q. B. 658; 3 Com. Cas. 285; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144; 7 Com. Cas. 172.

(*r*) (1793), 1 Sm. L. C. (11th ed.), p. 693.

(*s*) *Henderson* v. *Comptoir D'Escompte de Paris* (1874), L. R. 5 P. C. 253.

drawn to order, are not negotiable as a bill of exchange is negotiable. They are not negotiable in the strict sense of the term, for the transferee, though bonâ fide, and though he has given value for the bill, cannot get a good title from a transferor whose title is defective. They are in effect only negotiable so as to defeat, in favour of a bonâ fide transferee for value, the lien of the unpaid vendor and his right to stop *in transitu* (*t*).

Negotiability by Estoppel.—An instrument may be so worded as to preclude those who put it into circulation from denying its negotiability. If the owner of such an instrument clothes a third party with the apparent ownership and right to dispose of it, he will be estopped from asserting his title against a person to whom such third person has transferred it, and who received it in good faith and for value. The representation contained in the instrument is in effect the representation of the owner, and the ordinary doctrine of estoppel applies (*u*).

Bills of Exchange.

The law relating to the most important of the above-mentioned instruments has been arranged in the form of a code (which, however, is mainly declaratory, and made but few alterations in the law (*x*)), in the Bills

(*t*) *Gurney* v. *Behrend* (1854), 3 E. & B., at pp. 633, 634, *per* Lord Campbell; *Schuster* v. *McKellar* (1857), 7 E. & B. 704; and see observations of Selborne, L.C., and Lord Blackburn, in *Sewell* v. *Burdick*, (1885), 10 App. Cas. 74.

(*u*) *Colonial Bank* v. *Cady* (1890), 15 App. Cas., at p. 285; *Goodwin* v. *Robarts* (1876), 1 App. Cas., at pp. 489, 490.

(*x*) Lord Blackburn, in *McLean* v. *Clydesdale Banking Co.* (1884), 9 App. Cas. 105, 106; Lord Herschell, in *Bank of England* v. *Vagliano Brothers*, [1891] A. C., at p. 145.

of Exchange Act, 1882 (45 & 46 Vict. c. 61), and in it will be found the chief law on the subject; but all rules of common law and the law merchant, relating to bills of exchange, promissory notes and cheques, remain in force except in so far as they are inconsistent with the Act (*y*).

Definition.—"A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer" (*z*). From this it will be seen that what is required is a written instrument to which there are three parties, that the instrument must be an order to pay money, and that it must be unconditional (*a*). Thus, it may not order any act to be done, in addition to the payment of money (*b*); nor must it order payment out of a particular fund, for this would not be unconditional (*c*), but it may specify a fund out of which the payer may reimburse himself, or may specify a particular account to be debited with the amount (*d*). This definition includes cheques (*e*), and in *Barins* v. *London and South Western Bank* (*f*), a document in the form of an ordinary cheque ordering a banker to pay a sum of money "*provided the receipt form at foot*

(*y*) Section 97 (2). The references to sections are to those of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

(*z*) Section 3 (1).

(*a*) That is, the *bill* must be unconditional. As to conditional acceptances and indorsements, see *post*, pp. 309, 311.

(*b*) Section 3 (2).

(*c*) Section 3 (3).

(*d*) Section 3 (3).

(*e*) *Post*, p. 341.

(*f*) [1900] 1 Q. B. 270; 5 Com. Cas. 1.

hereof is duly signed, stamped and dated," was held not to be unconditional, and therefore not a cheque within the meaning of the Act.

Some usual forms of bills are as follows :

(I.)

£100. London, January 1st, 1889.

Two months after date pay C.D., or order, the
(STAMP.) sum of one hundred pounds sterling for value received.

To Mr. E. F. A. B.
London.

(II.)

Accepted, E. F.

£50. Bristol, 5th March, 1897.

(STAMP.) On demand pay C. D. the sum of fifty pounds sterling for value received.

To E. F. R. S.
York.

Accepted payable at the London and Westminster Bank Lothbury only.

(III.)

A. B. C.

£75. Newcastle, 1st March, 1897.

(STAMP.) Pay to X. Y. sixty days after sight seventy pounds sterling.

To A. B. C. F. G.

Accepted payable at Coutts' Bank.

Arthur James.

(IV.)

£100. Newcastle, 3rd October, 1897.

(STAMP.) Pay James Brown or bearer on 1st November, 1897, the sum of one hundred pounds for value received.

To Mr. ARTHUR JAMES. F. ROBERTS.

(V.)

£150. London, 1st June, 1897.

Accepted payable at Child's Bank. HENRY BROWN

(STAMP.) Ten days after date pay to my order the sum of one hundred and fifty pounds for value received.

To HENRY BROWN. JOHN SMITH.

The three parties are styled respectively in the case of Form I., the drawer A. B., the payee C. D., and the drawee (who, if he accepts, becomes acceptor) E. F., but the bill is good if it be drawn payable to the drawer (see Form V. above) or to the drawee (*g*). It should be added that the bill may, at the option of the holder, be treated as a promissory note if drawer and drawee are the same person (*h*). The drawee must be named or indicated with reasonable certainty, and if the bill is not payable to bearer, the same will apply to the payee (*i*). There may be several joint drawees, but alternative or successive drawees are not allowed (*k*) ; a drawee or referee, in case of need, may be named who, after dishonour and protest for non-acceptance, may accept or pay the bill with the holder's assent (*l*). The payee is the bearer if the bill expresses that it shall be so, or if the only or last indorsement is an indorsement in blank : it is payable to order if it is so expressed, or if it is expressed to be payable to a particular person, and

(*g*) Section 5 (1).

(*h*) Section 5 (2). So also if the drawee is a fictitious or non-capable person.

(*i*) Sections 6 (1) and 7 (1). It is permitted to add the drawer's name after the acceptor's death (*Carter* v. *White* (1884), 25 Ch. D. 666).

(*k*) Section 6 (2).

(*l*) Sections 15, 67.

does not contain words prohibiting transfer (*m*). The date should be inserted, but if a bill is issued undated, the omission is not fatal (*n*), and the holder may insert the true date ; if by bonâ fide mistake he inserts the wrong date, the date inserted will be deemed to be the true date, both as regards himself and every subsequent holder in due course (*o*). It may also be stated here that a date on the bill is, in the absence of evidence to the contrary, deemed to be the true date, and that an instrument to which the Act applies may be ante-dated, post-dated, or dated on a Sunday (*p*).

The sum payable by a bill is "certain" (*q*), although required to be paid (i) with interest, or (ii) by stated instalments, or (iii) by stated instalments with a provision that, on default in payment of any instalment, the whole shall become due, or (iv) according to an indicated rate of exchange to be ascertained as directed by the bill (*r*). If the words and figures differ, the amount payable is that expressed in words (*r*).

A signature on blank stamped paper may be delivered by the signer for the purpose of being converted into a bill, and such delivery operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover. Such an instrument after completion cannot be enforced against any person who became a party to it before completion, unless it was filled up within a reasonable time, and strictly in accordance with the

(*m*) Section 8 (3), (4). The effect of this is dealt with hereafter, p. 309.

(*n*) Section 3 (4) (a).

(*o*) Section 12. "Holder in due course" is defined *post*, p. 312.

(*p*) Section 13.

(*q*) See definition of a bill of exchange, *ante*, p. 298.

(*r*) Section 9.

authority given; except where after completion it is negotiated to a holder in due course (*s*).

But the common law doctrine of estoppel may apply to such instruments apart from any question of "negotiation." Thus, in *Lloyds' Bank, Limited* v. *Cooke* (*t*), where the defendant signed his name on a blank stamped piece of paper and handed it to a customer of the plaintiffs with authority to fill it up as a promissory note for a certain sum payable to the plaintiffs and deliver it to the plaintiffs as security for an advance to be made by them, and the customer fraudulently filled in a larger amount and obtained that amount from the plaintiffs, it was held that the defendant was estopped from denying the validity of the note as between himself and the plaintiffs. On the other hand, where the plaintiff signed blank forms of promissory notes and handed them to an agent for safe custody, it was held that the defendant was not liable to a bonâ fide indorsee for value to whom the agent had fraudulently negotiated them: for having handed the notes to his agent as custodian only, he was not estopped from denying their validity (*u*).

The words "value received" are usually inserted, but there is no necessity for this, as value is presumed until contradicted (*x*). The place where the bill is drawn or payable need not be stated (*x*).

The bill may be written on paper, or on parchment, or on anything except on a metallic substance, and it

(*s*) Section 20.

(*t*) [1907] 1 K. B. 794. The decision assumed that there was no negotiation of the note within the meaning of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20 (2). Cf. *Herdman* v. *Wheeler*, [1902] 1 K. B. 361.

(*u*) *Smith* v. *Prosser*, [1907] 2 K. B. 735. (*x*) Section 4.

may be written in pencil, or in ink, or may be partially or wholly printed. Every bill of exchange and promissory note must be stamped (*y*). The stamp, which must be a bill or note stamp, cannot be added after the date of the instrument.

Parties.—The Act declares that capacity to incur liability on a bill is co-extensive with capacity to contract (*z*), as to which see *ante*, p. 31. But the following rules are peculiar to the present subject:

No person who has not signed as such can be liable as drawer, indorser, or acceptor, except that a trade signature, or signature under an assumed name, is the equivalent of signature in the signer's own name (*a*). The signature of the name of a firm is equivalent to the signature by a person so signing of the names of all persons liable as partners of that firm (*a*).

A limited company incorporated for the purposes of trade or otherwise having capacity, may be a party to a bill, and will be bound if the bill is made, accepted, or indorsed in the name of, or by or on behalf or on account of the company by any person acting under its authority (*b*); but in order to bind the company the person signing must be some one who is *in fact* acting under its authority (*c*). The name of the company must appear in legible letters, and the word

(*y*) Instruments which do not come within the definition of a bill of exchange given above may, nevertheless, be such for the purpose of the Stamp Act.

(*z*) Section 22 (1). An infant cannot bind himself by accepting a bill (*Re Soltykoff*, [1891] 1 Q. B. 413).

(*a*) Section 23.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 77.

(*c*) *Premier Industrial Bank, Limited* v. *Carlton Manufacturing Co., Limited*, [1909] 1 K. B. 106.

"limited" after it; otherwise the officer who causes the signature to be attached is liable to a penalty as well as being personally liable on the bill (*d*).

An agent may have authority to sign for his principal, and if he uses words tending to show that he signs *quâ* agent merely he incurs no personal liability (*e*). But it does not follow because a man signs his name with words describing himself as agent, manager, etc., that he will be relieved from liability; the point to be determined is whether the words used suffice to give notice that the signature was affixed in the capacity of agent, or whether they are words of description. Thus, X. accepts bills as "X., executor of Y."; he is liable (*f*). But if he accepts "For the A. Co. Ltd., X. manager," he is not liable (*g*). If the signature is by procuration, the other parties are put on inquiry as to the extent of the authority (*h*); and if the contract be beyond the terms of the authority, the principal is not liable.

As to bills signed by one partner or more on behalf of the firm, see under "PARTNERSHIP" (*i*).

Where a bill is drawn or indorsed by an infant, or by a corporation having no capacity to incur liability on the bill, the holder may nevertheless enforce it against any other parties having power to contract (*k*); *i.e.*, the title to the bill is passed by the infant's signature, but is passed *sans recours* to him.

Acceptance.—The liability of the drawee does not arise until he has accepted the bill, and this is done by

(*d*) Companies (Consolidation) Act, 1908, s. 63.
(*e*) Section 26 (1).
(*f*) *Liverpool Bank* v. *Walker* (1859), 4 De G. & J. 24.
(*g*) *Alexander* v. *Sizer* (1869), L. R. 4 Ex. 102.
(*h*) Section 25.
(*i*) *Ante*, p. 183. (*k*) Section 22 (2).

writing his name across the face of it ; sometimes the word "accepted" is added, though this is not necessary. The Act defines acceptance as "the signification by the drawee of his assent to the order of the drawer" (*l*) ; and it enacts that (i) the signature of the drawee must be written on the bill ; (ii) the acceptance must not stipulate for performance by any other means than the payment of money (*m*). The bill may be accepted though it has not yet been signed by the drawer or is otherwise incomplete, or though already dishonoured, or though overdue (*n*) ; but no signature will be binding and irrevocable against any person until after unconditional delivery of the instrument, in order to give effect thereto ; but an acceptance becomes irrevocable if the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it (*o*).

Only the person to whom the bill is addressed can accept it, unless he accepts *supra protest* for the honour of a party liable on the bill (*p*).

Delivery between immediate parties and any remote party who is not a holder in due course may be shown to have been conditional only ; but a valid delivery of the bill by all parties prior to him is conclusively presumed in favour of a holder in due course (*q*). A valid delivery is also presumed to have taken place where the bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, but this presumption may be rebutted (*r*).

(*l*) Section 17 (1).
(*m*) Section 17 (2).
(*n*) Section 18.
(*o*) Section 21 (1).
(*p*) *Jackson* v. *Hudson* (1810), 2 Camp. 447; *post*, p. 308.
(*q*) Section 21 (2).
(*r*) Section 21 (3).

It is always advisable to present the bill for acceptance, for if it be refused, the parties, other than the drawee, become immediately liable, though the bill has not yet matured (*s*); and it is sometimes necessary, *e.g.*, where a bill is payable after sight, presentment is necessary to fix the maturity of the instrument; and when it is payable at a place other than the place of residence or business of the drawee, or when it is expressly stipulated that presentment shall be made, it must be presented for acceptance before it can be presented for payment (*t*).

The holder must present a bill payable after sight for acceptance, or negotiate it, within a reasonable time; what is a reasonable time depending upon usage and the facts of the particular case (*u*). Thus, on Friday a person received at Windsor a bill on London, and the bill being payable after sight it had to be presented for acceptance; the holder presented it on Tuesday, and the jury, regarding the fact that there was no post on Saturday, thought the time reasonable (*x*). The penalty for non-presentment is discharge of the drawer and all prior indorsers (*y*).

The following rules as to presentment for acceptance are given in s. 41 of the Act:

"(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on

(*s*) Section 43 (2).

(*t*) Section 39: unless the holder has not time to present for acceptance before presenting for payment (s. 39 (4)).

(*u*) Section 40 (3).

(*x*) *Fry* v. *Hill* (1817), 7 Taunt. 397; and see *Shute* v. *Robins*, 1 Moo. & M. 133; 3 C. & P. 80.

(*y*) Section 40 (2).

his behalf at a reasonable hour on a business day and before the bill is overdue:

"(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

"(c) Where the drawee is dead presentment may be made to his personal representative:

"(d) Where the drawee is bankrupt, presentment may be made to him or to his trustee:

"(e) Where authorised by agreement or usage, a presentment through the post office is sufficient."

Presentment, though otherwise necessary, is excused in the following cases, and the holder may treat the bill as though acceptance had been refused, *i.e.*, may (in fact, must, if he desires to hold his remedies against the drawer and the indorsers) (*z*) treat the bill as dishonoured for non-acceptance:

"(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:

"(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected:

"(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground" (*a*).

"The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment" (*b*).

(*z*) See s. 43 (1) (b).

(*a*) Section 41 (2). (*b*) Section 41 (3).

Acceptance for Honour supra Protest.—If the drawee does not accept upon presentment, it is the duty of the holder at once to treat the bill as dishonoured (*c*), and he may, if he thinks fit, note and protest (*d*) the bill for non-acceptance. In that case, if the bill is not overdue, and if the holder consents, any person not being a party already liable on the bill may accept it for the whole or part of the sum drawn (*e*), and such person is styled an *acceptor for honour supra protest*. He must sign the bill, and indicate thereon that his acceptance is for honour, and it is presumed to be an acceptance for the honour of the drawer, unless it state some other party for whose honour it has been made. Usually the acceptance for honour is attested by a notarial "act of honour" recording the process, but this is not necessary (*f*).

The course of conduct which should be pursued by a holder of a bill dishonoured by non-acceptance, and who has an offer of an acceptance for honour, is thus described: "He should first cause the bill to be protested, and then to be accepted *supra protest*, in the manner above described. At maturity he should again present it to the drawee for payment, who may, in the meantime, have been put in funds by the drawer for that purpose. If payment by the drawee be refused, the bill should be protested a second time for non-payment, and then presented for payment to the acceptor for honour" (*g*).

(*c*) Section 48.

(*d*) See *post*, pp. 324, 325; and see the Act, ss. 51, 93.

(*e*) Section 65. This may be done if the acceptor is insolvent or bankrupt, and the bill is protested for better security (s. 51 (5)).

(*f*) Chalmers' Bills of Exchange (7th ed.), p. 250.

(*g*) Byles on Bills (16th ed.), pp. 275, 276; and see s. 67; *Williams* v. *Germaine* (1828), 7 B. & C. 477.

Qualified Acceptances.—The following are qualified acceptances: (i) conditional, *i.e.*, which makes the bill payable on a condition therein stated; (ii) partial, *i.e.*, which limits the agreement to pay to a named portion of the amount for which the bill is drawn; (iii) qualified as to time (iv) acceptance by some, but not all, of the drawees; (v) local qualification, *e.g.*, "accepted payable at the London and County Bank, Lombard Street, only." But an acceptance to pay at a particular place is unqualified, and payment may be demanded anywhere, unless it states that the payment is to be made at a particular place only, and not elsewhere (*h*). An acceptance will not be treated as qualified unless the words used clearly make it so (*i*). The holder is not bound to take a qualified acceptance, and if the drawee refuses any other, the bill may be treated as dishonoured by non-acceptance (*k*); and if without the express or implied authority or subsequent assent of the drawer or of any indorser, the holder takes a qualified acceptance, he will release those who have not authorised it or assented to it (*l*).

Negotiation.—A bill may contain words prohibiting transfer or indicating an intention that it should not be transferable, and if it contains such words, although valid between the parties, it is not negotiable; but the intention to prohibit negotiation must be clearly expressed. It seems doubtful whether the negotiability of a bill payable to *order* can be restricted by such

(*h*) Section 19; and see form of bill No. III., *ante*, p. 299.

(*i*) *Decroix* v. *Meyer*, *per* Bowen, L.J., 25 Q. B. D., at p. 349; affirmed, [1891] A. C. 520.

(*k*) Section 44 (1).

(*l*) Section 44 (2), (3).

words (*m*). The characteristics of negotiability have already been pointed out, and it now remains only to show in what manner the instrument is put in circulation. The Act says that a bill is negotiated when it is so transferred as to make the transferee the holder of the bill (*n*). In the case of bills payable to bearer, this is done by mere delivery (*o*). In the case of those payable to order, indorsement, in addition to delivery, is requisite (*p*); and transfer, though for value, without indorsement gives only such rights as the transferor had in the bill, with a right to require indorsement (*q*). Thus, if A. has a bill payable to bearer, and he gives it in due course to B., B. holds it with all A.'s rights of suit on it, and without A.'s defects of title; if it be payable to order, B. may require A. to indorse it, but until this is done he holds it subject to any defence which could be raised against A.; such indorsement operates as a negotiation, but will not cure any defect of the transferor's title of which the indorsee had notice before the indorsement was obtained (*r*). The indorsement must be written on the bill, and signed by the indorser (in general, the signature alone is placed on the back, or, if there be not sufficient room on the bill, then on an annexed paper styled an "allonge," and this is sufficient) (*s*); if his name is misspelt, he may

(*m*) Section 8 (1); *National Bank* v. *Silke*, [1891] 1 Q. B. 435; as to cheques crossed "not negotiable," see *post*, p. 343.

(*n*) Section 31 (1).

(*o*) Section 31 (2).

(*p*) Section 31 (3). The bill is not really a negotiable instrument until it has been indorsed in such manner that it becomes payable to bearer.

(*q*) Section 31 (4).

(*r*) *Whistler* v. *Forster* (1863), 14 C. B. (N.S.), at pp. 257, 258.

(*s*) Section 32 (1).

sign according to the misspelling, and then add his correct name (*t*). A partial indorsement is useless as a negotiation (*u*); so would be the signature of one of several parties (not being partners) to whose joint order the bill is payable, unless such party is authorised by the others to act in this matter for them (*x*).

Indorsements are of two kinds: (1) in blank, (2) special. An indorsement is in blank when the signature of the indorser is written without any direction as to whom or to whose order the bill is to be payable, the bill is then payable to bearer; a special indorsement specifies the payee (*y*). Thus, if A. indorse a bill "Pay to B. & Co. or order," this operates as a special indorsement, and if B. & Co. desire to negotiate the bill they must themselves indorse it; this they may do either in blank or specially. It is always at the option of a holder to convert a blank into a special indorsement: he does so by writing above the indorser's signature a direction to pay the bill to, or to the order of himself or of some other person (*z*).

Indorsements are sometimes conditional, *e.g.*, indorsement by an agent or other person in such a way as to negative personal liability (*i.e.*, he adds to his name the words *sans recours*); indorsements conditional upon the arrival of a ship or the happening of an event (*a*). A particular form of conditional indorsement is the *restrictive indorsement*. A restrictive indorsement may be a mere authority to deal with the bill as directed, or it

(*t*) Section 32 (4).
(*u*) Section 32 (2).
(*x*) Section 32 (3).
(*y*) Section 34.
(*z*) Section 34 (4).
(*a*) The acceptor may pay the indorsee on maturity though the condition has not yet been fulfilled (s. 33).

may be an indorsement prohibiting further negotiation; *e.g.*, "Pay D. only," "Pay D. or order for collection," "Pay to A. B. or order for my use." Such an indorsement gives the indorsee the right to receive payment of the bill and to sue any party that his indorser could have sued, but he cannot transfer, without express power given by the bill, his rights as indorsee under it. And even in accordance with such power, any transfer confers only the rights and with them the liabilities of the restrictive indorsee in respect of the bill (*b*). The restrictive indorsee becomes the agent of the indorser in respect of the bill.

A holder who negotiates a bill payable to bearer by delivery without indorsement is styled a transferor by delivery; he incurs no liability on the instrument. If such transferor negotiates the bill he warrants to his immediate transferee being a holder for value, (i) that the bill is what it purports to be; (ii) that he has a right to transfer it; (iii) that at the time of the transfer he is not aware of any fact which renders it valueless (*c*).

Rights and Liabilities.

Rights of the Holder.—The holder is defined as the payee or indorsee of a bill or note who is in possession of it, or the bearer (*d*). Holders fall into one of two divisions, viz., those who are holders in due course, and those who are not.

A holder in due course is one who has taken a bill, (1) complete and regular on the face of it; (2) before it was overdue, and without notice that it had been

(*b*) Section 35. (*c*) Section 58. (*d*) Section 2.

previously dishonoured, if such was the fact; (3) in good faith and for value; and (4) without notice of any defect in the title of the person who negotiated it. All four are requisite (*e*).

The rights of the holder in due course are to sue in his own name any or all of the parties to the bill, and to do so free of any defence depending upon any defect of title in or any mere personal defence available to prior parties amongst themselves (*f*).

A holder who has not obtained the bill in due course may sue on it in his own name, but is liable to be defeated by some defect of title in his predecessors or by defences of a personal nature available against them, other than set-off (*g*). He may, however, indorse it to a holder in due course, in which case the latter obtains a good and complete title; he may also receive payment in due course, and may give the payer a valid receipt (*h*).

"A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder" (*i*).

From the above it is clear that a holder cannot be "in due course," unless he is ignorant of any fraud or illegality in connection with the bill on the part of the person who negotiated the bill to him, *and* unless he has given value for it. This, which is provided by s. 29 of

(*e*) Section 29. As to what constitutes a defective title, see *post*, p. 314. A forger's title is not defective; he has no title at all. See *post*, p. 349.

(*f*) Section 38.

(*g*) Section 38; *Ex parte Swan* (1868), L. R. 6 Eq. 344.

(*h*) Section 38 (3).

(*i*) Section 29 (3).

the Act of 1882, is very old law. "Where money or notes are paid bonâ fide, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come malâ fide into a person's hands they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover" (*k*).

The defects of title specially mentioned in the Act, which afford an answer to an action on the bill by any party with notice of the defects are—fraud, duress [force and fear], other unlawful means, illegal consideration, and negotiation in breach of faith, or under circumstances amounting to a fraud (*l*).

Though actual notice of these defects is, of course, sufficient to invalidate the title of a person claiming to be a holder in due course, notice will be imputed to him if it can be shown that he received information which cast upon him the duty of making further inquiries, and that he abstained from doing so because they might injure his title. However, "it is not enough to show that there was carelessness, negligence or foolishness in not suspecting that the bill was wrong, when there were circumstances that might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not, in themselves, make a defence to an action upon a bill of exchange" (*m*). Negligence will not affect the title of the holder if his conduct is, in fact, honest (*m*).

(*k*) Lord MANSFIELD, in *Clarke* v. *Shee* (1774), Cowp. 197, at p. 200.

(*l*) Section 29 (2). These are not exhaustive; "force and fear" is a technical term of Scotch law, inserted because the Act applies to Scotland.

(*m*) Section 90; *Jones* v. *Gordon* (1877), 2 App. Cas., at p. 628, *per* Lord BLACKBURN; *Miller* v. *Race* (1791), 1 Sm. L. C. (11th ed.) 463.

"Valuable consideration" in connection with bills of exchange means any consideration necessary to support a simple contract (*n*) or an antecedent debt or liability (*o*); and where value has at any time been given for a bill, the holder for the time being is deemed to be a holder for value, as regards the acceptor, and all parties who became such prior to the time when value was given (*p*). And as the law does not inquire into the adequacy of a consideration, taking a bill at a considerable undervalue is not of itself sufficient to affect a holder's title, though in the circumstances of any particular case it may be evidence that he was not acting honestly (*q*).

Sometimes a bill is signed by a person as drawer, acceptor, or indorser without consideration for the purpose of lending his name to some other person. The person so signing is an "accommodation party" to the bill, and is in substance a surety for the person accommodated; but a holder for value may sue the accommodation party, although he knew him to be such when he took the bill (*r*). The want of consideration, although a defence against a holder who has not given value, does not constitute a defect of title sufficient to invalidate negotiation.

It often becomes important to decide on whom lies the burden of proof of showing bona fides and the giving of value; the ordinary rule is this: when it is shown that the acceptance, issue, or negotiation of the bill is affected with fraud, duress, or illegality, the

(*n*) Section 27. See *ante*, p. 16. If a cheque is paid into a bank on the footing that the amount may be at once drawn on, the bank is a holder for value (*Ex parte Richdale* (1882), 19 Ch. D. 409).

(*o*) See as to the common law, *ante*, p. 20.

(*p*) Section 27.

(*q*) *Jones* v. *Gordon* (1877), 2 App. Cas. 616. (*r*) Section 28.

holder (unless he is the person to whom the bill was originally delivered (*rr*)) must prove that after the alleged fraud, etc., value has in good faith been given for the instrument (*s*). But until such defect is shown, a holder is deemed to be a holder in due course (*t*).

It has already been said that to constitute a "holder in due course," he must have acquired the bill before it was overdue, for a bill which is negotiated after that date is taken subject to any defect of title affecting it at maturity, and henceforth none can give a better title than they themselves have (*u*). A bill payable on demand is overdue when it appears on the face of it to have been in circulation for an unreasonable time (*x*); the maturity of other bills depends upon their date and wording (*y*). Payment before maturity will not discharge the bill, and if it is put in circulation afterwards such payment will be no answer to a holder in due course (*z*). A bill known by the holder to have been dishonoured is treated as regards that holder as though it were an overdue bill (*a*).

If the bill is lost before it is overdue, the drawer may be compelled to give another bill of the same tenor, at the request of the person who was the holder; the latter giving security against the claims of any person who may become possessed of the lost instrument (*b*).

(*rr*) *Talbot* v. *Von Boris*, [1911] 1 K. B. 854.

(*s*) Section 30 (2); and see *Hall* v. *Featherstone* (1858), 3 H. & N. 284; *Tatam* v. *Haslar* (1889), 23 Q. B. D. 345.

(*t*) Section 30.

(*u*) Section 36 (2).

(*x*) Section 36 (3). This is not so in the case of promissory notes See *post*, p. 349.

(*y*) See *post*, p. 331.

(*z*) *Burbidge* v. *Manners* (1812), 3 Camp. 193.

(*a*) Section 36 (5).

(*b*) Section 69. And the court may in any proceeding upon a bill order that the loss of it shall not be set up, provided an indemnity be

A case of some peculiarity arises when the bill is negotiated back to a holder, who has previously signed it as a drawer or indorser, *e.g.*, A. draws a bill in favour of C.; C. indorses it to D., D. to E., and E. to A. In this case A. cannot enforce the bill against any intervening party, for they themselves have an exactly corresponding right against him (see next paragraph). He is said to be precluded from suing on the ground of "circuity of action"; but he may reissue the bill (*c*). However, if, owing to the circumstances, the holder would not have been liable to the particular indorser whom he is suing, then his own previous signature is no answer in the action. For instance, A. bought goods of B., and C. was to be surety for the price; B. drew bills on A., indorsed them to C., who reindorsed them to B., and it was decided that as in this case there was a state of facts negativing the intention of reserving in C. a right of action against B., "circuity of action" would not avail as a defence in an action by B. against C. (*d*).

Rights of Parties other than the Holder.—Each of the indorsers of the bill is liable to the holder, and to any subsequent indorser who pays the bill at maturity. Correlatively each party who has put his name to the bill may claim against any who previously have signed it, whether by way of acceptance, drawing, or indorsement; *e.g.*, the drawer may fall back on the acceptor for compensation; the first indorser has his remedy against the acceptor and the drawer, and so forth. Any party

given against the claims of any other person upon the instrument (s. 70).

(*c*) Section 37.

(*d*) *Wilkinson & Co.* v. *Unwin* (1881), 7 Q. B. D. 636.

but the acceptor may sign the bill *sans recours*, *i.e.*, may put his name on the bill, expressly and on the instrument itself, disclaiming any personal liability, and any party taking after this is bound by the disclaimer (*e*).

It will be seen from the above that a bill with several names attached is a form of contract of suretyship (*f*); the acceptor being the principal debtor, the other parties being sureties with regard to him, but generally not in regard to each other (*g*); but they have no right of contribution *inter se*. The indorser who pays a holder is entitled, as a surety who pays the creditor would be, to any securities held by the holder in respect of the bill (*h*). So if the holder agrees to give time to the acceptor after maturity, the indorsers who do not assent are discharged (*i*). If the bill has been accepted for the accommodation of the drawer, the acceptor is liable to the holder, but he has a right of indemnity against the drawer, and the rights of a surety in connection therewith (*k*).

Right to Notice of Dishonour.—When a bill has been dishonoured either by non-acceptance or by non-payment (*l*), there is, in the former case, an immediate right of recourse against the drawer and indorsers, and

(*e*) Section 16.

(*f*) See *Jones* v. *Broadhurst* (1850), 9 C. B. 173.

(*g*) *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, 744.

(*h*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1881), 6 App. Cas. 1.

(*i*) *Tindal* v. *Brown* (1786), 1 T. R. 167. See under "SURETYSHIP," *post*, p. 452.

(*k*) *Beckerraise* v. *Lewis* (1872), L. R. 7 C. P., at p. 377; *ante*, p. 315.

(*l*) As to payment, see *post*, p. 330.

in the latter against the acceptor, the drawer, and the successive indorsers; but these have, in general, a right to notice of dishonour, and those who receive no notice when such is requisite are freed from liability. The acceptor is not entitled to notice of dishonour (*m*).

The notice must be given within a reasonable time after dishonour, and, in the absence of special circumstances, these rules apply:

Time.—(i) Where the parties, who are to give and receive notice respectively, reside in the same place, it should be sent in such time as to reach the person to whom it is sent on the day after dishonour; (ii) where they live in different places, it should be sent on the day after dishonour, or if there be no post at a convenient hour on that day, then by the next post thereafter (*n*). If the bill when dishonoured is in the hands of an agent, he has a similar time allowed him wherein to communicate with his principal, and then the principal in turn has a similar allowance; the agent may, however, give notice direct to the parties interested (*o*); and each person who receives notice has a similar time after receipt of notice wherein to communicate with prior parties (*p*). Delay in giving notice of dishonour is excused if it is caused by circumstances beyond the control of the party giving notice, and is not imputable to his negligence (*q*).

To and By Whom to be Given.—(1) It should be given by the holder, or by an indorser who is himself

(*m*) Section 52 (3).

(*n*) Section 49 (12). When the letter is duly addressed and posted, subsequent miscarriage will not affect the party's rights (s. 49 (15)).

(*o*) Section 49 (13).

(*p*) Section 49 (14). (*q*) Section 50 (1).

liable on the bill, or by an agent acting on behalf of either (*r*); (2) it must be given to the person entitled to it, or to his agent in that behalf (*s*), or (if the drawer or indorser entitled to notice is dead, and the holder knows it) to his personal representative, if there be one, and he can be found with reasonable diligence (*t*); or (if he is bankrupt) either to the party himself or to his trustee in bankruptcy (*u*); where there are two or more drawers or indorsers, not being partners, notice must be given to each, unless one of them has authority to receive notice for the others (*x*).

No particular form is required; writing, personal communication, or partly one and partly the other, will suffice, provided that the identity of the bill and its dishonour by non-acceptance or non-payment is sufficiently indicated; so also will return of the dishonoured bill to the drawer or indorser (*y*). When given by the holder it enures for the benefit of all subsequent holders, and of all prior indorsers who have a right against the party to whom it has been given; and notice given by an indorser enures for the benefit of the holder and all indorsers subsequent to the party who has received notice (*z*).

Notice is required in the generality of cases, and that this should be so is clearly equitable. A man may have indorsed a bill away, value £100, due on September 3rd; if he hears nothing about it by, say, September 12th, his remedies against parties liable to him might become

(*r*) Section 49 (1), (2).
(*s*) Section 49 (8).
(*t*) Section 49 (9).
(*u*) Section 49 (10).
(*x*) Section 49 (11).
(*y*) Section 49 (5)—(7). For examples of notices held sufficient, see Chalmers on Bills of Exchange (7th ed.), pp. 172—174.
(*z*) Section 49 (3), (4).

less valuable or be lost by his being unable to enforce them promptly. If afterwards he is asked to pay, great hardship might be inflicted upon him ; hence the necessity of notice of dishonour. But in the following cases either this would not apply, or else a greater hardship would be inflicted on the holder by requiring him to give notice.

Thus, an omission to give notice of dishonour will not operate as a discharge (a) where the bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission will not be prejudiced, and (b) where due notice of dishonour is given on non-acceptance, and no acceptance is in the meantime given, notice of subsequent dishonour by non-payment is unnecessary (*a*).

Notice of dishonour is dispensed with in the following cases (*b*) :

(a) Where reasonable diligence is used, but notice is impossible, or does not reach the person sought to be charged ;

(b) Where notice is waived by the party entitled to it ;

(c) As regards *the drawer* when—(i) drawer and drawee are the same person ; (ii) where the drawee is a fictitious person or a person having no capacity to contract ; (iii) where the drawer is the person to whom the bill is presented for payment ; (iv) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill (*c*) ;

(*a*) Section 48. (*b*) Section 50 (2).

(*c*) For instance, where a banker has no funds to meet a cheque, or the bill was accepted for the accommodation of the drawer.

(v) where the drawer has countermanded payment;

(d) As regards the *indorser*—(i) where the bill was accepted or made for his accommodation; (ii) where the indorser is the person to whom the bill is presented for payment; (iii) where the drawee is a fictitious person or a person not having capacity to contract, to the knowledge of the indorser at the time of indorsement.

In a well-known case (*d*), the meaning of the word "fictitious" was considered, and though the decision was upon a different section of the Act, the interpretation given would doubtless apply to the word as used in this section. The facts were these: C. Petridi & Co. was an actual firm carrying on business at Constantinople, and Vucina, a foreign correspondent of Messrs. Vagliano of London, was in the habit of drawing bills on Messrs. Vagliano to the order of Petridi & Co. A clerk in the employment of Messrs. Vagliano forged bills, putting in himself the names of Petridi & Co., as payees, and Vucina as drawer; to these he procured genuine acceptances of his firm; he then forged the indorsement of Petridi & Co., making it an indorsement to a non-existing person, "Maratis," and then took the bills to the bank, and received payment of them across the counter. On the discovery of the forgeries, the question arose, Who was to bear the loss? and for the bank it was urged that the bills, being payable to the order of a fictitious person, were to be treated as payable to bearer (*e*); the case turned,

(*d*) *Bank of England* v. *Vagliano*, [1891] A. C. 107.
(*e*) Section 7 (3).

therefore, to a large extent on the meaning of "fictitious" as the word is used in the Bills of Exchange Act, 1882. The contention was that "fictitious" meant "fictitious with respect to the occasion," and that the mere placing of a name which was actually borne by somebody would not prevent that name from being, in this sense, fictitious. It was decided by CHARLES, J. (*f*), and by the Court of Appeal, ESHER, M.R., *diss.* (*g*), that Petridi & Co. were not fictitious; the House of Lords, however, by a majority came to a different conclusion, and supported the view of Lord ESHER (*h*); and Lord HERSCHELL said: "I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer." So a cheque drawn to the order of a fictitious or non-existing person may be treated as payable to bearer, although the drawer believes and intends the cheque to be payable to a real person (*i*).

Both the above-mentioned cases were distinguished by WARRINGTON, J., in *Vinden* v. *Hughes* (*k*). In that case the plaintiff's clerk filled up cheques payable to the order of certain customers with the names of the

(*f*) (1889), 22 Q. B. D. 103. (*g*) (1889), 23 Q. B. D. 243.
(*h*) [1891] A. C. 107, at p. 153.
(*i*) *Clutton* v. *Attenborough*, [1897] A. C. 90.
(*k*) [1905] 1 K. B. 795. See also *North and South Wales Bank* v. *Macbeth*, [1908] A. C. 137.

customers and sums of money which were not in fact owing to them. The clerk obtained the plaintiff's signature as drawer, forged the indorsements and negotiated the cheques to the defendant, who took them in good faith and for value. It was held that the payees were not "fictitious," because the drawer believed when signing the cheques that he owed the sums mentioned to the persons whose names appeared on the cheques. *Bank of England* v. *Vagliano* was distinguished on the ground that there being no drawer in fact in that case, the use of a name as payee was a mere fiction.

Protest.—In the case of an inland bill, protest, though sometimes useful, is optional, save where acceptance or payment for honour is desired (*l*). But in the case of a foreign bill (*m*), appearing on the face of it to be such, the drawer and indorsers are discharged if, in the event of non-acceptance, the bill is not protested; and protest is necessary also, if a foreign bill which was not dishonoured by non-acceptance is dishonoured by non-payment (*n*). Protest may be excused under circumstances similar to those mentioned above in the case of notice of dishonour (*o*).

Form of Protest.—A protest must contain a copy of the bill, must be signed by the notary making it, and must specify the person at whose request the bill is protested; the place and date of protest; the cause or reason for protesting the bill; the demand made and the answer given, if any, or the fact that the drawee

(*l*) Section 51 (1).
(*m*) *Post*, p. 338.
(*n*) Section 51 (2).
(*o*) Section 51 (9).

or acceptor cannot be found (*p*). The protest must be stamped (*q*). If the services of a notary cannot be obtained, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate will in all respects operate as a formal protest (*r*).

Time for Protest.—The bill should be protested on the day of dishonour, but if noted on that day, it may be protested afterwards as of that day (*s*); delay is excused if caused by circumstances beyond the control of the holder, not imputable to his default, misconduct, or negligence (*t*).

Place of Protest.—A bill must be protested at the place where it is dishonoured, save that (i) when a bill is presented through and returned dishonoured through the post, it may be protested at the place to which it is returned, and (ii) if the bill is drawn payable at some place of business or residence other than that of the drawee, and is dishonoured by non-acceptance, it must be protested at the place where it is expressed to be payable (*u*).

Liability of the Acceptor.—The drawee is not obliged to accept the bill, and in the event of refusal is under

(*p*) Section 51 (7). If the bill is lost or destroyed or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof (s. 51 (8)).

(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 90 and Sched. I.

(*r*) Section 94. A special form is given in the Schedule to the Act.

(*s*) Section 51 (4); s. 93. "Noting" is the minute made by the notary on which the formal notarial certificate—the protest—is based. See Chalmers on Bills of Exchange (7th ed.), p. 188.

(*t*) Section 51 (9). (*u*) Section 51 (6).

no liability on it (*x*). If he does accept, he engages to pay according to the tenor of his acceptance (*y*), and this whether or not he has received consideration. By accepting he admits to a holder in due course the existence of the drawer, his signature, and his capacity and authority to draw, and if the bill is payable to the drawer's order his then capacity to indorse; further, if the bill is payable to the order of a third person, he admits the existence of the payee, and his then capacity to indorse; but these admissions do not include the genuineness or validity of the indorsements (*z*). If he has given his acceptance for honour, "*supra* protest," the liability is not absolute, but accrues only if the drawee does not pay, and then only when the bill has been duly presented for payment and dishonoured, and has been again protested (the protest on non-acceptance being of itself insufficient), and of these facts he is entitled to notice (*a*). His liability, when it attaches, is to the holder, and to all parties subsequent to the party for whose honour the bill was accepted (*b*).

Liability of the Drawer.—He must pay the bill if it is dishonoured by non-acceptance or by non-payment on the part of the drawee if due notice of dishonour be given (*c*). It has been pointed out that "a bill drawn upon a third party in discharge of a present debt may in truth be regarded as an offer by the drawer that, if the payee will give time for payment, he will give an order on his debtor (the acceptor) to pay a given sum at a given time and place. The payee agrees to take

(*x*) Section 53 (1).
(*y*) Section 54 (1).
(*z*) Section 54 (2).
(*a*) Section 66 (1).
(*b*) Section 66 (2).
(*c*) Section 55 (1).

this order, and to give the time required, with a proviso that if the acceptor do not accept, and pay the bill, and he, the payee (or the holder of the bill), give notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, with lawful interest" (*d*). He may not deny to a holder in due course the existence of the payee, and his then capacity to indorse (*e*).

Liability of the Indorser.—He engages, if the bill is duly presented and dishonoured, to compensate the holder or any subsequent indorser, provided he has the requisite notice of dishonour (*f*). He must be taken to admit to a holder in due course the genuineness of the signatures of the drawer and of the previous indorsers; and he may not deny to a subsequent indorsee the validity of the bill, and that he had a good title to it at the time of indorsement (*f*).

A person who signs a bill otherwise than as a drawer or acceptor, thereby incurs the liability of an indorser to a holder in due course (*g*). But such an indorser may not be liable to the drawer. Thus, where the plaintiffs drew a bill on A. to their own order *without indorsing it*, and A. returned it accepted and backed by the defendant to guarantee payment, the plaintiffs could not recover on the bill against the defendant. When the plaintiffs received the bill, it was not "complete and regular on the face of it," as it lacked their own indorsement, and so they were not holders in due

(*d*) Broom's Common Law (9th ed.), p. 466.
(*e*) Section 55 (1).
(*f*) Section 55 (2).
(*g*) Section 56.

course, and by the law merchant a drawer is liable to an indorser, and not an indorser to a drawer (*h*).

But if a bill is accepted and indorsed in blank in pursuance of an agreement by the indorser to become surety for its payment, and is then handed to the person in whose favour it was signed, he may fill in his name as drawer and indorse it, treating the bill as having been indorsed by him to the indorsing surety and then reindorsed to himself for value (*i*).

As has been stated above, each indorser may be called on to pay, by way of indemnity, the whole amount (unless he protected himself against this by the form of his indorsement) paid on the bill by a subsequent indorser, and the liabilities of indorsers *inter se* will ordinarily be determined according to this rule. But any special circumstances may be considered, in order to ascertain the true relations of the parties. Thus, when A., B., and C., directors of a company, mutually agreed with each other to become sureties to a bank for a certain debt of the company, and in pursuance of that agreement indorsed three promissory notes of the company, it was decided that the first of the three indorsers need not indemnify the others, but that each was liable in a proportionate amount (*k*). The rule is that indorsements are presumed to have been made in the order in which they appear on the bill (*l*).

(*h*) *Jenkins* v. *Coomber*, [1898] 2 Q. B. 168; *Steele* v. *McKinlay* (1880), 5 App. Cas. 754.

(*i*) *Glenie* v. *Bruce Smith*, [1907] 1 K. B. 507; affirmed, [1908] 1 K. B. 263.

(*k*) *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, 744.

(*l*) Section 32 (5).

Extent of the Liability on a Dishonoured Bill.—This differs in the case of a bill dishonoured in the British Isles and one dishonoured abroad. The measure of damages on a bill dishonoured at home is (i) The amount of the bill : added to (ii) interest from the date of maturity, or if the bill is payable on demand, of presentment for payment ; added to (iii) the expenses of noting, and of any necessary protest (*m*). On a bill dishonoured abroad the measure is (*n*) the amount of the re-exchange with interest till the time of payment (*o*), *i.e.*, the sum for which a bill at sight would have to be drawn at the time and place of dishonour, to realise at that place the amount of the dishonoured bill and the expenses consequent on its dishonour, regard being had to the rate of exchange on the day in question between the place of dishonour and the place where the party liable and sought to be charged resides (*p*). It has been decided that notwithstanding the above, if a bill drawn abroad is dishonoured at home and the drawer is by foreign law under a liability to the holder to pay re-exchange, he may, if the bill is duly protested, recover such re-exchange from the acceptor (*q*).

If justice requires it, the interest may be withheld whether the bill be an inland or a foreign bill (*r*).

(*m*) Section 57 (1). See *ante*, p. 324.

(*n*) The holder has no option to sue for the damages provided for the case of a dishonour at home (*Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522).

(*o*) Section 57 (2).

(*p*) See Chalmers on Bills of Exchange (7th ed.), p. 212.

(*q*) *In re Gillespie, Ex parte Robarts* (1887), 18 Q. B. D. 286.

(*r*) Section 57 (3).

Discharge of the Bill.

The grounds of discharge are these: payment by the acceptor (or sometimes by others), waiver, cancellation, merger, alteration. In addition certain parties may be discharged by want of notice of dishonour or by omission to duly present the bill.

Payment.—In order to operate as a discharge, this must be made by the proper person and in due course. Payment by or on behalf of the acceptor at or after maturity will always operate as a discharge if made bonâ fide to the holder without notice of any defect in his title (*t*); payment by the drawer or indorser does not discharge the bill; save that an accommodation bill is discharged if paid by the party accommodated (*u*).

Payment must be made to the party entitled, and it is on this account that the payee must be in the first instance a person named or indicated with reasonable certainty, though a bill may be made payable to several payees jointly, or alternatively to one of them, or to the holder of an office for the time being (*x*), and it may be made payable to bearer. If a fictitious (*y*) or non-existing person is named as payee the bill may be treated as payable to bearer (*z*). Primâ facie the holder is entitled to payment.

When a bill to order on demand, drawn on a banker, is presented for payment to that banker, he should pay the bill, and if he does so in good faith and in the

(*t*) Section 59.
(*u*) Section 59 (2), (3).
(*x*) Section 7.
(*y*) See *Vagliano Bros.* v. *Bank of England*, *ante*, p. 322.
(*z*) Section 7 (3).

ordinary course of business, though the indorsement is forged or made without authority, he is held harmless (*a*).

The amount paid must be the correct amount, which, therefore, must be a sum certain (*b*). The bill is payable at maturity. It is payable on demand, if it is so expressed, or if no time for payment is named, or if it is stated to be payable at sight or on presentation; also if it is accepted or indorsed when overdue, it is, as regards such acceptor or indorser, deemed to be payable on demand (*c*). If it is payable at a fixed period after date or sight or on or after a fixed period after any specified event which is certain to happen, the date is determined according to the tenor (*d*).

A bill on demand is payable on the day of demand, but in other cases the time of payment is determined as follows: The day of payment is included, and the day from which the time is to begin to run is excluded (*e*); in addition to this, three days of grace are allowed, and on the last of these the bill must be paid (*f*). The whole day is available for payment, *i.e.*, in general the whole of the business hours of the

(*a*) Section 60.

(*b*) *Ante*, p. 301. (*c*) Section 10.

(*d*) Section 11. It must be observed, however, that a bill payable on a contingency is bad; and see s. 12, as regards filling up the date when the instrument has been issued undated.

(*e*) Section 14 (2).

(*f*) Section 14. In this section will be found provisions for the case when the last day of grace falls on a Sunday or a bank holiday—viz., (a) if the last day of grace falls on a Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving, the bill is due and payable on the preceding business day; but (b) if the last day of grace is a bank holiday other than the above, or if the last day of grace is a Sunday and the second day of grace a bank holiday, the bill is due and payable on the succeeding business day.

day (*g*). Payment may be made before it is due, but it will not then operate as a discharge except between the parties to the payment, and will be no answer to a holder in due course (*h*).

When a bill is paid the holder may be compelled to deliver it up to the party paying it (*i*).

Presentment for Payment is a necessity (except in the cases mentioned below), and without it there is no right to enforce payment against the drawer and indorsers of the bill (*k*), but if the bill be accepted generally no presentment is required to render the acceptor liable (*l*).

The time of presentment is determined as follows: if the bill is payable on demand it must (to affect the drawer) be presented within a reasonable time after its issue, and (to affect an indorser) within a reasonable time after its indorsement; if payable otherwise, then it must be presented on the day on which the bill falls due (*m*). Delay caused by circumstances beyond the control of the holder is excused if not imputable to his default, misconduct or negligence (*n*).

The place of presentment is determined by the terms of the acceptance. If accepted payable at a particular place, presentment must be made at the place named: if the acceptor's address is on the bill, this (if no other place is specified) will demonstrate the proper place; if no place is specified and no address given, it should

(*g*) *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759.
(*h*) Section 59 (2). (*k*) Section 45.
(*i*) Section 52 (4). (*l*) Section 52 (1).
(*m*) Section 45. The acceptor cannot always demand the exact carrying out of this duty. See s. 52 (2).
(*n*) Section 46 (1).

be presented to the acceptor at his place of business if known, and if not at his ordinary residence ; otherwise it may be presented to the acceptor at his last-known place of business or residence, or to himself wherever he may be found (*m*). The presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day. It must be made to the person designated by the bill as payer or to some person authorised by him to pay or to refuse payment, if such can be found. If there are several designated payers and no place of payment is specified, then to all of them, unless they are partners. If the drawer or acceptor is dead, presentment must be made, if possible, to his personal representative. Agreement or usage may authorise presentment through the post office (*o*).

Delay in making presentment is excused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. Presentment will be dispensed with (i) where after the exercise of reasonable diligence, it cannot be effected ; (ii) where the drawee is a fictitious person (*p*) ; (iii) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (*q*) ; (iv) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented ; (v) if it is waived, expressly or by implication (*r*).

(*o*) Section 45.
(*p*) See *ante*, p. 322.
(*q*) *E.g.*, if as between them it is an accommodation bill.
(*r*) Section 46.

The holder must, on presentment, exhibit the bill to the person from whom payment is demanded (*s*).

Payment for Honour.—If a bill is not paid at maturity it becomes dishonoured by non-payment, and the holder immediately acquires his consequent rights against the parties. If it has been protested for non-payment, any person may intervene and pay it for the honour of any party liable thereon or for whose account the bill is drawn (*t*); the intervention is then called "payment for honour," and the payer steps into the place of the holder, to the extent of his rights against the defaulter and those who were liable to him; parties subsequent to the party for whose honour the bill is paid are discharged (*u*); this "payment for honour *supra* protest" must be attested by a notarial act of honour, which may be appended to the protest (*x*).

The Amount Payable is generally the amount due, with interest, if agreed. Interest runs from the date of the bill, or (if it be undated) from date of issue, unless the bill otherwise provides (*y*); a partial acceptance makes the acceptor liable only to the amount for which he has accepted. When the drawer pays off a certain part of the amount, is the acceptor freed *pro tanto* or can he be sued for the whole, the holder being then liable to the drawer for the excess recovered? In an action by a holder against the acceptor, payment by the drawer or an indorser of any part is no answer (*z*).

(*s*) Section 52 (4).
(*t*) Section 68 (1).
(*u*) Section 68 (5).
(*x*) Section 68 (3).
(*y*) Section 9 (3).
(*z*) Section 59 (2); *Jones* v. *Broadhurst* (1850), 9 C. B. 173, 183.

unless the bill is an accommodation bill, given for the accommodation of the drawer (*a*).

Waiver.—To constitute this a discharge of the bill the holder must absolutely and unconditionally renounce his rights against the acceptor ; and he must do so in writing, unless the bill is delivered up to the acceptor. If the bill is allowed to remain in circulation, renunciation is no defence as against a holder in due course who has received no notice of the waiver (*b*). At common law accord without satisfaction does not operate to discharge a party from liability, unless a release under seal is given ; the law merchant did not adopt this principle and permitted the holder of a bill to discharge the acceptor without consideration ; and, subject to the conditions above mentioned, the Act has recognised the peculiar rule of the law merchant.

Cancellation (*c*).—Cancellation discharges the person whose name is cancelled, and also all indorsers who would have a right of recourse against him, unless (1) the cancellation was not intentional ; or (2) was made without the holder's consent ; or (3) was made by mistake ; the burden of proving that the cancellation took place under these conditions is on the party seeking to support the bill. If the bill as a whole is thus cancelled, all parties are discharged.

Alteration (*d*).—Material alteration of the bill or acceptance without the assent of all parties liable, avoids the bill, except as against a party who has made,

(*a*) *Lazarus* v. *Cowie* (1842), 3 Q. B. 459 ; *Cook* v. *Lister* (1863), 32 L. J. C. P. 121 (s. 59 (3)).

(*b*) Section 62.

(*c*) Section 63.

(*d*) Section 64.

authorised, or assented to the alteration and except as against subsequent indorsers. If, however, the alteration is not apparent, the holder in due course may sue for the amount of the bill as it stood before alteration (*e*). Material alterations are, *inter alia*, alterations of date, amount, time, and place of payment, or the addition of a particular place of payment, where the original acceptance was general.

The alteration must be material. In *Garrard* v. *Lewis* (*f*), defendant signed an acceptance, the amount being left in blank, but the figures in the margin were £14 0*s*. 6*d*.; the drawer filled up the bill for £164 0*s*. 6*d*., and altered the figures to make them correspond, and it was decided that the marginal figures not being a material part of the bill, the alteration was no defence to an action by a bonâ fide holder (*g*).

The statute and these decisions are in accordance with the old law on the subject, as laid down in the case of *Master* v. *Miller* (*h*); in that case, ASHURST, J., says: "I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract."

(*e*) See *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514.
(*f*) (1883), 10 Q. B. D. 30.
(*g*) These rules do not apply to bank notes. See *post*, p. 350.
(*h*) (1791), 4 T. R., at p. 331.

Merger.—Under some circumstances this will discharge the bill, *e.g.*, when the acceptor becomes holder of the bill in his own right, at or after maturity (*i*). The acceptor must, however, receive back the bill with a right good against the world and not subject to that of any other person, so that if it is transferred to him without consideration in fraud of a previous holder in due course, he will still remain liable on it (*k*).

Bills in a Set (*l*).

Bills are frequently drawn in a set, *e.g.*, two, three, or more parts, and if they are numbered and refer one to the other, the whole of the parts constitute one bill. The drawee should accept one part only, and, if he accepts more than one, he will be liable on each part as though it were a separate bill, save where all get into the hands of one holder; he should not pay unless the accepted part is produced to him, for if he does so, and that part is eventually presented by a holder in due course, he must pay again. If a holder of a set indorses different parts to different persons, he is liable on each part for the full amount, and so will be all subsequent indorsers on the parts they indorse. Subject to the above, payment of one part discharges the set. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but this must not prejudicially affect the position of a person who in due course accepts or pays the first part presented to him.

(*i*) Section 61.
(*k*) *Nash* v. *De Freville*, [1900] 2 Q. B. 72.
(*l*) Section 71.

Foreign Bills.

An inland bill is one which purports on the face of it to be both drawn and payable within the British Isles, or to be drawn within them, upon some person resident therein. Any other bill is a foreign bill. Unless the contrary appear on the face of it, a bill may be treated by the holder as an inland bill (*m*).

The form of a foreign bill usually differs from an inland bill, the former being drawn, as a rule, in sets, and at one or more *usances* (*i.e.*, the time for payment allowed by custom as between the country of draft and the country of payment). When a foreign bill is dishonoured, protest is a necessity save as against the acceptor; in the case of an inland bill it is optional (*n*).

It is a matter of some difficulty to decide what law governs a foreign bill, whether the law of the place of draft, or of the place of payment. The rules relating to this are to be found in s. 72 of the Bills of Exchange Act, 1882; their main result seems to be that the law of the place where the act is to be done is to be the law governing the performance of that act, *e.g.*, a bill drawn in England, accepted in France, payable in Holland; here English law governs the drawing, French law the acceptance, Dutch law the payment (*o*).

(*m*) Section 4.

(*n*) Sections 51, 52 (3).

(*o*) See, as regards the law previous to the Act, the cases of *Rothschild* v. *Currie* (1839), 1 Q. B. 43; *Rouquette* v. *Overmann* (1875), L. R. 10 Q. B. 525; *Trimbey* v. *Vignier* (1834), 1 Bing. N. C. 151; *Lebel* v. *Tucker* (1868), L. R. 3 Q. B. 77; *Bradlaugh* v. *De Rin* (1870), L. R. 5 C. P. 473. And since the Act, *In re Marseilles Extension Rail. and Land Co.* (1885), 30 Ch. D. 598.

Agreements intended to Control the Instrument.

It sometimes happens that agreements are made by the parties at the time of acceptance, indorsement, etc., and these, if in writing, may have an effect as between the parties to them, and as regards those who take with notice of the agreement. If the agreement is contemporaneous and oral, it cannot be proved, for it would be an attempt to vary a written instrument by oral testimony. For example, if when a bill is given there is an oral agreement between the drawer and the acceptor that it shall be renewed, effect cannot be given to such agreement because it contradicts the contract contained in the bill to pay it at maturity. As between and to affect immediate parties oral evidence may be given to show there was no consideration, or to show that the delivery was not made with the intention that the bill should operate as a contract, or that it was conditional, or to show that the contract has been discharged (*p*).

A subsequent agreement may be made to vary the terms, and will bind all who have notice, but it is a fresh agreement, and must be supported by consideration (*q*).

It sometimes happens that a special agreement is entered into between the drawer and acceptor, whereby the former undertakes to give certain securities to the latter to compensate him in the event of his not being put in funds before the maturity of the bill. If these

(*p*) *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487; *Abrey* v. *Crux* (1870), L. R. 5 C. P. 37; *Foster* v. *Jolly* (1835), 1 C. M. & R. 708.

(*q*) *McManus* v. *Bark* (1870), L. R. 5 Ex. 65.

parties become insolvent, can the bill holder claim to come in under this arrangement, and take the securities in payment of his bill? If one of the parties remain solvent this is not a matter of importance, as the holder will get payment from that one; but if both drawer and acceptor become insolvent, the case becomes important, and on ordinary principles the holder would seem to have no right to the specific security. This, however, is not the law. The rule in *Ex parte Waring* (*r*) applies. This has been stated thus (*s*): "Where, as between the drawer and the acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor; then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill." And COTTON, L.J., said that "if there has been a general appropriation of securities to meet the bills drawn by A. upon B. the securities must be applied in accordance with the rule" (*t*). If the person to whom the securities are sent, uses them for his own purpose, and does not apply them to the bill, and the sender raises no objection, then the rule does not apply (*u*). The rule is of an unusual character, and its application gives

(*r*) (1815), 19 Ves. 345.

(*s*) By Mr. Eddis, quoted by BRETT, M.R., in *Ex parte Dever* (1885), 14 Q. B. D. 611, 620.

(*t*) (1885), 14 Q. B. D. 623.

(*u*) *In re Gothenburg Commercial Co.* (1881), 29 W. R. 358.

rise to many difficulties; for a full consideration see Grant on Banking (6th ed.), pp. 683—686.

CHEQUES.

The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), deals with these, and in s. 73 defines them as bills of exchange drawn on a banker, payable on demand; the definition of a bill of exchange given in the Act applies to cheques (*x*), and so generally do all provisions of the Act applicable to bills payable on demand, except as otherwise provided in Part III. (ss. 73—82).

Mention has already been made of the history of cheques in the judgment in *Goodwin* v. *Robarts* quoted above (*y*).

When a cheque is presented, the banker must pay it if he has funds in his hands belonging to the drawer (*z*); otherwise he becomes liable to an action at the suit of the customer for wrongfully dishonouring the cheque (*a*).

The holder of a cheque must present it for payment within a reasonable time of its issue (*b*), and if the drawer is entitled at the time of such presentment as between himself and the banker to have the cheque paid, and if owing to non-presentment within a reasonable time he is damnified (*e.g.*, by the insolvency of

(*x*) Lord BLACKBURN in *McLean* v. *Clydesdale Banking Co.* (1884), 9 App. Cas. 95, 106 (s. 73).

(*y*) *Ante*, pp. 288 *et seq.*

(*z*) See dicta in *Goodwin* v. *Robarts*, *supra*; *Pott* v. *Clegg* (1847), 16 M. & W. 321.

(*a*) *Marzetti* v. *Williams* (1831), 1 B. & Ad. 415.

(*b*) Section 74 (2).

the banker), he is discharged to the amount of the damage suffered; in such a case, the holder may obtain judgment for the amount against the banker (*c*).

A banker's authority to pay a customer's cheque is revoked (i) by countermand of payment (*d*); (ii) by notice of the customer's death (*d*); and (iii) by notice that the customer has committed an "available" act of bankruptcy. He may refuse to pay a cheque on an account which is the subject of a garnishee order (*e*). A cheque is not an equitable assignment of the drawer's balance, and accordingly a third party has no right of action against a banker for refusing to honour it (*f*).

Crossed Cheques.—A cheque, across the face of which two parallel lines are drawn (between which the words "and Company," or any abbreviation of them, may be placed), is styled a crossed cheque. A cheque crossed generally contains the above only; a cheque crossed specially contains the name of a banker in addition, and then is said to be crossed to that banker (*g*).

This crossing (which is a material part of the cheque (*h*)) may be added to an uncrossed cheque by the drawer or the holder, and either may turn a general into a special crossing (*i*). A banker may convert an uncrossed cheque into a crossed one, or a general crossing into a special crossing to himself (*i*). He may re-cross a specially crossed cheque to another banker for collection (*i*); in no other case may a specially

(*c*) Section 74 (1), (3).

(*d*) Section 75. The banker is not bound to act on an unauthenticated telegram (*Curtice* v. *London, City and Midland Bank*, [1908] 1 K. B. 293).

(*e*) *Rogers* v. *Whiteley*, [1892] A. C. 118.

(*f*) *Schroeder* v. *Central Bank of London* (1876), 34 L. T. 735.

(*g*) Section 76. (*h*) Section 78. (*i*) Section 77.

crossed cheque be crossed to more than one banker, and if it is so, the duty of the banker to whom it is presented is to refuse payment (*k*).

When a cheque is crossed it must be paid through a banker, and if it is crossed specially, through the banker whose name is on it. For safety's sake the words "not negotiable" are often added, and although they do not affect the transferability of the cheque, they limit its negotiable character, rendering a transferee liable to have set up against him the defects of title available against a previous holder. In the words of the Act "he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had" (*l*). Frequently the cheque is further crossed "account of A. B.," in which case it will, according to the direction, be paid into that account at the bank to which the special crossing refers.

A banker who pays a cheque drawn on him otherwise than according to the crossing is liable to the true owner for any loss he may sustain by such payment (*m*). If the crossing is obliterated, or if the cheque appears not to be crossed, and not to have been added to, or altered otherwise than in accordance with the Act, then if the banker acts in good faith and without negligence, he is not responsible if he treats the cheque as uncrossed (*n*). But if he pays in conformity with the crossing in good faith and without

(*k*) Section 79 (1).

(*l*) Section 81. It seems this is the only way in which a cheque payable to order or bearer can be made not negotiable (*National Bank* v. *Silke*, [1891] 1 Q. B. 435).

(*m*) Section 79. (*n*) Section 79 (2).

negligence, he is placed in the same position as if he had paid the true owner, and if the cheque has reached the payee, the drawer is entitled to the same protection (*o*).

A collecting banker is protected in dealing with crossed cheques by s. 82 of the Bills of Exchange Act, 1882 (*p*), which enacts that "where a banker in good faith and without negligence receives payment for a customer (*q*) of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The cheque must be crossed when it comes to the banker's hands (*r*). The protection conferred by s. 82 was held to be limited to cases in which the banker receives the cheque as a mere agent for collection. Now, a banker may and often does give the customer immediate credit for the cheque with the intention that the customer shall be entitled to draw against it, before it is cashed. Such giving of credit of itself constitutes the banker a holder for value of the cheque, and he cannot then be considered to receive payment for the customer (*r*).

In consequence of the decision in *Gordon's Case* an amending statute (*s*) was passed, which enacted that

(*o*) Section 80. By s. 17 of the Revenue Act, 1883 (46 & 47 Vict. c. 55), the protection (which was confined to cheques only) is extended to other documents drawn on bankers, and intended to enable any person to obtain payment of the sum mentioned therein.

(*p*) See also Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17.

(*q*) Whether a person is a "customer" within the meaning of this section is a question of fact, but he must have some sort of account with the bank (*Great Western Rail. Co.* v. *London and County Banking Co.*, [1901] A. C. 414; 6 Com. Cas. 275).

(*r*) *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240.

(*s*) 6 Edw. 7, c. 17 (The Bills of Exchange (Crossed Cheques) Act, 1906).

"a banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

It is not clear how far the statute alters the previous law. It certainly protects the banker where the immediate crediting of the cheque is a mere book-keeping entry, but does it do so in cases where the credit given confers a *right* on the customer to draw against the cheque before it is cleared? This difficulty will no doubt come before the courts for solution.

Forgeries.—This part of the subject affects bills and other instruments as well as cheques. The following remarks, unless expressly excepted, apply generally.

A forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge for it or to enforce payment of it can be acquired through or under that signature (*t*). But to this there are exceptions, for the acceptor and indorser are precluded from denying to a holder in due course the genuineness of the drawer's signature, etc. (*u*); and a title acquired abroad by a forged indorsement under circumstances which give a good title according to the law of the country where the transfer takes place, will be recognised and acted upon by the English courts (*x*).

The fact that the forgery was caused or facilitated by the negligence of the acceptor is not, of itself, a reason for holding him liable on a forged bill, even to an

(*t*) Section 24. (*u*) *Ante*, pp. 326, 327.
(*x*) *Embericos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677.

innocent holder for value (*y*). Similarly, the mere fact that a cheque is drawn with spaces which can be utilised for the purpose of fraudulent alteration, is not of itself any violation of a customer's duty to his banker; and the rule applies although the banker could not, by the exercise of ordinary care, have avoided paying such a cheque as altered (*a*).

A banker who pays a forged bill or cheque cannot debit his customer with the amount (*b*). So when the amount of an instrument is fraudulently altered, the banker who pays it can recover from his customer only the amount originally placed thereon (*c*).

Although a customer owes a duty to take reasonable care in issuing cheques not to mislead the banker, there is no duty on the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants (*d*). Thus, a banker could not debit his customer with the amount of a forged cheque because the latter had left his cheque book in an unlocked drawer (*e*).

Bankers paying on *forged indorsements* stand on a somewhat different footing. Section 60 provides that a banker who pays in good faith and in the ordinary course of business a cheque, bill, or other draft on himself to order on demand, bearing a forged indorsement, is deemed to have paid in due course. He is,

(*y*) *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514.

(*a*) *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559.

(*b*) *Roberts* v. *Tucker* (1851), 16 Q. B. 560; *Hall* v. *Fuller* (1826), 5 B. & C. 750.

(*c*) *Hall* v. *Fuller*, *supra*.

(*d*) *Kepitigalla Rubber Estates, Limited* v. *National Bank of India*, [1909] 2 K. B. 1010.

(*e*) *Bank of Ireland* v. *Evans' Trustees* (1855), 5 H. L. Cas. 389, 410.

therefore, not liable to his customer for the amount. Only bankers are protected by this section (*f*).

A person paying money under a forged instrument to a bonâ fide payee may recover it, if he was not negligent in making the payment, and if the mistake is discovered and demand made for repayment before the position of the payee has been altered ; but as even the delay of a day may seriously compromise the position of a man of business, it seems in practice the payer will seldom be entitled to succeed (*g*). But as no title can be made through a forged indorsement the true owner of a bill may recover the proceeds, even from an innocent third party, as money received to his use, or may recover damages for conversion from any person who has wrongfully dealt with the bill so as to cause him loss (*h*).

Post Dating.—A post-dated cheque, bearing a penny stamp, may be sued on at maturity, notwithstanding the provisions of s. 38 of the Stamp Act, 1891 (54 & 55 Vict. c. 39) (*i*), and it may be validly negotiated before the due date to a holder in due course (*k*).

Promissory Notes.

A promissory note is defined by the Act to be (*l*) "an unconditional promise in writing made by one

(*f*) *Ogden* v. *Benas* (1874), L. R. 9 C. P. 513.

(*g*) See *Cocks* v. *Masterman* (1830), 9 B. & C. 902 ; *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7 ; 1 Com. Cas. 170.

(*h*) *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578. This must, of course, be understood subject to the protection afforded by the Act to bankers. *Cf. Barnes* v. *London and South Western Bank*, [1900] 1 Q. B. 270 ; 5 Com. Cas. 1.

(*i*) *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715.

(*k*) *Hitchcock* v. *Edwards* (1889), 60 L. T. 636.

(*l*) Section 83.

person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer." An instrument in the form of a note payable to maker's order is not a note until indorsed by the maker (*ll*). If on the face the note purports to be both made and payable within the British Isles, it is an inland note; any other is a foreign note (*ll*). The usual form of a promissory note is as follows:

£50. York, August 5th, 1886.

(STAMP.) [Three] months after date [or on demand] I promise to pay A. B. or order [or bearer] fifty pounds. A. F. G.

Here A. F. G. is the maker and A. B. the payee; when A. B. puts his name on the back he becomes an indorser. The differences between a note and a bill are manifest; a bill has three original parties, a note has but two.

The contract of the maker is to pay the note according to its tenor, and he may not deny to a holder in due course the existence of the payee, and his then capacity to indorse (*m*). This liability may be joint, or joint and several, according to the number of makers—for any number may jointly make a note—and their liability depends upon the tenor of the note. Thus, "I promise to pay," etc., signed by more than one person, is a joint and several promise (*n*); "we jointly agree," etc., is a joint promise. There is no liability till delivery

(*ll*) Section 83.
(*m*) Section 88. (*n*) Section 85.

of the note, for until then the instrument is incomplete (*o*).

Presentment for Payment.—This is necessary in some cases, and then the formalities as to time, place and mode of presentment should be observed (*p*). A note payable on demand, which has been negotiated, is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it has elapsed since its issue (*q*); but after indorsement it must be presented within a reasonable time of the indorsement or the indorser will be discharged (*r*). In this respect the law relating to bills and to notes differs. A note made payable at a particular place must be presented for payment at that place; in any other case presentment for payment is not necessary to make the maker liable (*s*); but it is always necessary to make the indorser liable (*t*).

Generally.—Subject to the necessary modifications, the provisions of the Act as to bills apply to notes, except as above, and except those relating to: (1) presentment for acceptance; (2) acceptance; (3) acceptance *supra* protest; (4) bills in a set (*u*). And protest of a foreign note on dishonour is not necessary (*x*).

In applying such provisions to notes, the maker of the note corresponds to the acceptor of a bill, and the

(*o*) Section 84.
(*p*) As to these, see *ante*, pp. 332—334; and see ss. 86, 87.
(*q*) Section 86 (3); *Glasscock* v. *Balls* (1890), 24 Q. B. D. 13.
(*r*) Section 86 (1).
(*s*) Section 87 (1).
(*t*) Section 87 (2).
(*u*) Section 89.
(*x*) Section 89 (4).

first indorser of a note corresponds to the drawer of an accepted bill payable to drawer's order (*y*).

BANK NOTES.

These are promissory notes issued by a banker, payable to bearer on demand. Their properties were considered in the leading case of *Miller* v. *Race* (*z*), where Lord MANSFIELD recognised them as negotiable instruments. "They are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin that is used in common payments, as money or cash."

In a later case, DENMAN, J., said that Bank of England notes differ from ordinary promissory notes and notes of other banks in two important characteristics, viz., they are always payable to bearer without indorsement, and they are legal tender for the amounts represented by them. He did not consider that the ordinary rules relating to bills would of necessity relate to bank notes, though they do relate to promissory notes generally. In this particular case he decided that the alteration of the number on a bank note was an alteration sufficient to discharge the bank from liability on the note, though had the ordinary rule prevailed, no alteration affecting the contract having been made, the liability would have remained (*a*). So also, in *Suffell* v.

(*y*) Section 89 (2). (*z*) 1 Sm. L. C. (11th ed.), p. 463.
(*a*) *Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84, 90.

Bank of England (*b*), JESSEL, M.R., said: "A Bank of England note is not an ordinary commercial contract to pay money. It is, in one sense, a promissory note in terms, but no one can describe it as simply a promissory note. It is part of the currency of the country. It has long been made so by Act of Parliament, it is a legal tender for any sum above £5, and it must be issued to any one who brings a certain quantity of bullion to the Bank, and demands it, as he has a right to do, for the purpose of using it as a currency" (*c*).

(*b*) (1882), 9 Q. B. D. 555.
(*c*) Page 563; and see remarks of BRETT, L.J., at p. 567.

INSURANCE.

Insurance has been stated to be a contract either to indemnify against a loss which may arise upon the happening of some event, or to pay, on the happening of some event, a sum of money to the person insured. The instrument containing the contract to insure is called a *policy of insurance*, the person insured is called the *assured* or the *insured*, and the person who insures is called the *insurer*, *assurer*, or the *underwriter*, the latter term being used chiefly in the case of insurance of marine risks.

There are many forms of this contract, for a man may agree to insure anything, from a pane of glass to his own life: but the three forms of greatest importance are *Life Insurance*, *Fire Insurance*, and *Marine Insurance*. These will be considered separately.

In *Carter* v. *Boehm* (*d*),[a] Lord Mansfield said, "Insurance is a contract on speculation"; and this being the case, it is frequently hard to distinguish, as regards principle, a contract to insure from an ordinary wager. In *Godsall* v. *Boldero* (*e*), Lord Ellenborough said that insurance was in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering. This means that it is not an agreement to pay money on the mere happening of a certain event, but to compensate the insured for any damage suffered owing to its occurrence. This state-

(*d*) 1 Sm. L. C. (11th ed.) 491. 494.
(*e*) 2 Sm. L. C. (11th ed.) 263, 270.

ment, though true of marine and fire insurance, does not accurately describe the contract of life insurance ; the latter is an engagement to pay a certain sum of money on the death of a person, and when once fixed it is constant and invariable (*f*). Another distinction suggested is, that in the case of a wager, there is no interest in the result of the event entitling to compensation if it does not occur, whereas in all insurance contracts such an interest must exist, *i.e.*, there must be what is styled an insurable interest.

It has just been said that in some of its forms the contract is one of indemnity, *e.g.*, A. insures a house against fire for £1,000 ; in course of time suppose the house to be burnt down ; if £550 will restore it, that amount, and that amount only, can be obtained. "The very foundation, in my opinion, of every rule which has been promulgated and acted on by the courts with regard to insurance law is this, viz., that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified" (*g*). Thus, A. agreed to sell a house to B. for £3,100, and had insured the premises against fire. Before completion of the contract to sell, the house was burnt, and the insurance company, not having been informed of the contract of sale, paid the amount of damage ; subsequently, the purchase was completed,

(*f*) *Dalby* v. *Indian and London Life Insurance Co.* (1855), 15 C. B. 365 ; 2 Sm. L. C. (11th ed.) 271.

(*g*) BRETT, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 386.

and the vendor obtained the full value agreed, and it was decided that the amount of the insurance money must be refunded to the company (*h*). In giving judgment, BOWEN, L.J., said: "What is really the interest of the vendors, the assured? Their insurable interest is this—they had insured against fire, and they had then contracted with the purchasers for the sale of the house, and, after the contract, but before completion, the fire occurred. Their interest, therefore, is that at law they are the legal owners, but their beneficial interest is that of vendors, with a lien for the unpaid purchase-money. That was decided in the case of *Collingridge* v. *Royal Exchange Assurance Corporation* (*i*); but can they keep the whole, having lost only half? Surely it would be monstrous to say that they could keep the whole, having lost only half . . . They would be getting a windfall by the fire, their contract of insurance would not be a contract against loss, it would be a speculation for gain" (*k*).

Contracts of insurance are *uberrimæ fidei*, and every fact of any materiality must be disclosed, otherwise there is ground for rescission. "Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary" (*l*); and in these contracts the rule is strictly enforced, as the facts are generally within the knowledge of the insured alone. Thus, speaking of marine insurance, Arnould says (*m*):

(*h*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380.

(*i*) (1878), 3 Q. B. D. 173.

(*k*) *Castellain* v. *Preston*, *supra*, at p. 401.

(*l*) Lord MANSFIELD, in *Carter* v. *Boehm* (1765), 1 Sm. L. C. (11th ed.), at p. 495.

(*m*) Marine Insurance, § 535; and see BLACKBURN, J., in *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 537.

"The principle is now firmly established that the misrepresentation from mistake, ignorance, or accident, of any material fact, however innocently made, will avoid the policy quite as much as in cases where such misrepresentation arises from a wilful intention to deceive." Life insurance stands on the same footing. In the case of *London Assurance Co.* v. *Mansel* (*n*), JESSEL, M.R., said: "As regards the general principle, I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances, from the peculiar nature of marine insurance, which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle, than a distinction in principle." It has now been settled that this principle applies to all contracts of insurance, *e.g.*, a policy which covers the risk of a debtor becoming insolvent (*o*).

A non-disclosure arising not from any fraud, nor from any negligence, but even from want of knowledge, may be ground for vitiating a policy, if on the wording of the agreement to insure, such appears to be the intention of the parties; *e.g.*, when the actual truth of statements made is asserted in language amounting to a warranty (*p*).

(*n*) (1879), 11 Ch. D. 363; and see *Lindenau* v. *Desborough* (1828), 8 B. & C. 586, 592.

(*o*) *Seaton* v. *Heath*, [1899] 1 Q. B. 782; 4 Com. Cas. 193; reversed on the facts, *sub nom. Seaton* v. *Burnand*, [1900] A. C. 135; 5 Com. Cas. 198.

(*p*) *Thomson* v. *Weems* (1884), 9 App. Cas. 671.

The general remarks above apply to all species of insurance. It is now intended to deal with matters peculiar to the more important forms of this contract.

LIFE INSURANCE.

Life insurance is "a contract by which the insurer, in consideration of a certain premium, either in a gross sum, or by annual payments, undertakes to pay to the person for whose benefit the insurance is made, a certain sum of money or annuity on the death of the person whose life is insured" (*q*).

To prevent gambling in these transactions, the statute 14 Geo. 3, c. 48, was passed. This enacts that—(1) no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any other person or persons, wherein the person or persons for whose use, benefit, or on whose account such policies shall be made, shall have no interest (which means pecuniary interest) (*r*), or by way of gaming or wagering; and every insurance made contrary to the true intent and meaning hereof shall be null and void to all intent and purposes (*s*); (2) the name of the person so interested, or for whose benefit the policy is made, shall be inserted (*t*); (3) in all cases where the insured has such an interest, no greater sum shall be recovered than the value of the interest at the date of the policy (*u*). If, in the meantime, his interest ceases, he may yet recover at the death, it being essential that he should

(*q*) Smith's Mercantile Law (11th ed.), p. 551.
(*r*) Lord TENTERDEN, in *Halford* v. *Kymer* (1830), 10 B. & C. 724.
(*s*) Section 1.
(*t*) Section 2. (*u*) Section 3.

have his interest only at the date of the making of the policy (*x*). It should further be observed that an assignee of a valid policy need not have an interest (*y*).

What is an insurable interest? It is difficult to describe, but the following illustrations will show what has been the opinion of the courts under the circumstances therein existent. A creditor may insure the life of his debtor to the extent of his debt (*z*); a trustee may insure in respect of the interest of which he is a trustee (*a*); a wife may insure her husband (*b*); a husband may insure his wife (*c*); and a man may insure himself; but a father has not necessarily an insurable interest in the life of his son (*d*).

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11, it is provided that a married woman may effect a policy upon her own life, or upon the life of her husband, for her separate use. Further, it provides that if a man or a married woman effect a policy upon his or her own life, or on each other's lives, and the policy is expressed to be for the benefit of the other or for the benefit of the children, this shall create a trust (*e*), which, so long as any object of the trust remains unperformed, shall not form part of the insured's estate, nor be subject to the insured's debts.

(*x*) *Dalby* v. *India, etc. Co.* (1855), 2 Sm. L. C. (11th ed.) 271.

(*y*) *Ashley* v. *Ashley* (1829), 3 Sim. 149.

(*z*) *Godsall* v. *Boldero* (1807), 2 Sm. L. C. (11th ed.) 263.

(*a*) *Tidswell* v. *Ankerstein* (1792), Peake, 151.

(*b*) *Reed* v. *Royal Exchange Assurance Co.* (1795), Peake, Add. Ca. 70.

(*c*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805.

(*d*) *Halford* v. *Kymer* (1830), 10 B. & C. 724.

(*e*) If the trust fails, the money goes into the deceased's estate (*Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147).

But if it be proved that the policy was effected, and the premiums paid to defraud the creditors of the insured, these will be entitled out of the moneys payable under the policy, to a sum equal to the premiums paid.

Assignment of the Policy.—At one time the assignee could not sue in his own name, but since 1867 this power has been given (*f*) ; but (i) the assignee is liable to be defeated by defences which would have been good against the assignor (*g*) ; (ii) he should give written notice to the insurance company, for in the event of a second or further assignment, the priorities will depend upon the date of this notice ; and further, any bonâ fide payment made by the company previous to such notice will be valid in favour of the company (*h*). The company must specify on the policy the place of business at which such notices may be given, and upon receiving notice it must acknowledge the receipt of it in writing (*i*).

FIRE INSURANCE.

Fire insurance is a contract, one party to which undertakes to indemnify the other against the consequence of a fire happening within an agreed upon period, in return for the payment of money in a lump sum or by instalments. The insured must have an insurable interest in the premises insured, *i.e.*, he must be in such a position that he incurs loss by the burning ; thus, a creditor may insure a house over which he has a

(*f*) 30 & 31 Vict. c. 144.
(*g*) Section 2.
(*h*) Section 3.
(*i*) Sections 4, 6.

mortgage (*k*); a warehouseman may insure his customer's goods (*l*).

A contract of fire insurance made by an agent without authority cannot be ratified by the principal after and with knowledge of the loss by fire of the subject-matter insured (*m*).

The contract being one of indemnity, only the amount of loss actually suffered can be recovered; this Bowen, L.J., calls "the infallible rule" (*n*).

By an Act of 14 Geo. 3, c. 78, s. 83, it is provided that any interested person may procure that the insurance money shall be laid out in rebuilding the premises, but a clear and unambiguous request to the insurers to rebuild should be made. Instead of rebuilding the place themselves, the company may permit the parties claiming the money to do so upon sufficient security being given that the money shall be laid out in such rebuilding (*o*).

Assignment of the Policy.—This is allowed only with the consent of the office (*p*), and the benefit of the insurance will not run with the property, nor is the vendor even trustee for the purchaser of any money

(*k*) *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699.

(*l*) *Waters* v. *Monarch Assurance Co.* (1856), 5 E. & B. 870.

(*m*) *Grover and Grover* v. *Matthews*, [1910] 2 K. B. 401. This rule does not apply to contracts of marine insurance. See *post*, p. 373.

(*n*) *Castellain* v. *Preston* (1883), 11 Q. B. D., p. 401. See also *ante*, pp. 353, 354, where the facts of the case are set out and the application of this principle generally to contracts of insurance is discussed.

(*o*) See *Westminster Fire Office* v. *Glasgow Provident Investment Society*, *supra*. It is doubtful whether this statute applies in England beyond the area included in the bills of mortality.

(*p*) *Sadlers' Co.* v. *Bedcock*, 2 Atk. 554 (decided in 1734).

recovered (*q*) ; as a fact he will have to return it to the company (*r*).

Rights and Duties.—There is, of course, the ordinary right to be paid the value of the insurable interest on the burning of the property, and also the corresponding duty of paying the premiums. The property must be accurately described in the policy, and any material variation will be fatal ; *e.g.*, a policy entered into by a person not a linen draper including "linen, wearing apparel, and plate," was held to be exclusive of anything but household linen, and linen bought for sale purposes was therefore not within it (*s*). It is frequently agreed that notice of loss shall be given within a certain time to the company or its agents, and that this shall be accompanied with particulars ; and it may be made a condition precedent to recovering (*t*).

SUBROGATION.

The insurer is entitled to every right of the assured, whether such right consists in contract, tort, or otherwise, or, as BRETT, L.J., says: "As between the underwriter (*u*) and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consist in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by

(*q*) *Rayner* v. *Preston* (1881), 18 Ch. D. 1.

(*r*) See *ante*, pp. 353, 354.

(*s*) *Watchorn* v. *Langford* (1813), 3 Camp. 422.

(*t*) *Mason* v. *Harvey* (1853), 8 Exch. 819.

(*u*) The contract in this particular case was a fire policy ; but though the term underwriter is more usual in connection with marine insurance, its use is not confined to that form of insurance.

way of condition or otherwise, legal or equitable, which can be, or has been, exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been, diminished" (*x*). This is called the *doctrine of subrogation*. It entitles the insurer who pays the insured not only to the value of any benefit received by the latter by way of compensation for actual loss, but also to the value of any rights or remedies the insured may have against third parties in respect of the damage; if, therefore, the insured renounces such rights, to which the insurer would be subrogated, he is bound to make up the amount to the insurer (*y*). But, on the other hand, this doctrine allows an insurance company to enforce only those rights which the assured himself could have enforced, and therefore, when a wife feloniously burnt her husband's property, and the company brought an action against the man and his wife for her misdeed, the action was dismissed, as the husband could not, as the law then stood, bring an action against her (*z*).

(*x*) *Castellain* v. *Preston* (1883), 11 Q. B. D., p. 388.

(*y*) *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226.

(*z*) *Midland Insurance Co.* v. *Smith* (1881), 6 Q. B. D. 561.

MARINE INSURANCE (*a*).

Since the appearance of the last edition of this work the law relating to marine insurance has been codified by the Marine Insurance Act, 1906. It has therefore become unnecessary to cite many of the older cases as authorities for the propositions of law which are laid down; but some have been retained for purposes of illustration where the scope and meaning of a section is not at first sight apparent. A few recent decisions dealing with the interpretation of the statute have also been added.

Marine insurance is a contract of indemnity against losses incident to marine adventure accruing to the ship, cargo, freight, or other subject-matter of a policy during a given voyage or voyages, or during a given length of time (*b*). The person who is indemnified is called the "assured," or the "insured," the other party being styled the "insurer" or the "underwriter." The policy may be so extended as to protect the assured against losses on inland waters or on any land risk which may be incidental to a sea voyage (*c*). The contract is generally entered into through the agency of brokers, who are responsible to the underwriters for the premium (*d*), and the mode of contracting and the various details are much regulated by the custom of

(*a*) References to sections are to those of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

(*b*) Section 1.

(*c*) Section 2 (1).

(*d*) See *ante*, p. 153.

the different associations whose members are engaged in this particular kind of transaction.

All persons who have insurable interests may be insured, unless they are alien enemies (*e*), and any companies or persons not under disability may be insurers.

Amongst subject-matters of marine insurance may be named the ship, the goods connected therewith, the cargo, freight, money lent on bottomry, etc.; but as in other contracts, so in marine insurance, there can be no valid agreement with regard to illegal trading.

ASSIGNMENT OF POLICY.

When a person has insured his interest in any vessel, cargo, or freight, he may assign his policy to another, unless the terms of the policy forbid it, and that other may sue in his own name, but is liable to be met by the same defences as would have been valid against the original assured. The policy may be assigned either before or after loss (*f*). An assured who has no interest cannot assign; but this rule does not affect the assignment of a policy after loss (*g*). An assignment can be made by indorsement, or (if the policy be indorsed in blank) by delivery (*f*).

INSURABLE INTEREST.

A person has an insurable interest when he is interested in a marine adventure, and in particular where he stands in any legal or equitable relation

(*e*) *Brandon* v. *Nesbitt* (1794), 6 T. R. 23.
(*f*) Section 50. (*g*) Section 51.

to the adventure or to any insurable property (*h*) at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, damage, or detention, or may incur liability in respect thereof (*i*). There is a marine adventure where insurable property (*h*) is exposed to maritime perils, or where the earning of freight, etc., or the security for advances is endangered by the exposure of insurable property to maritime perils, or where any liability is incurred, by a person interested in or responsible for insurable property, by reason of maritime perils (*k*). Such interest must exist at the time of the loss, but may accrue during the pendency of the policy, and if the goods are insured, "lost or not lost," such interest in them may be acquired after loss has actually occurred, unless at the time of effecting the insurance, the assured was aware of the loss and the insurer was not (*l*). Defeasible and contingent interests are insurable, and so is a partial interest of any nature (*m*).

The following are examples of persons having an insurable interest :

(a) Shipowners and owners of goods—to the extent of the value of their interest (*n*).

(b) A mortgagee—to the extent of the sum due to him (*o*).

(c) A mortgagor—to the full value of the property (*o*).

(*h*) Ship, goods or other movables (s. 3 (2) (a)).
(*i*) Section 5.
(*k*) Section 3 (2).
(*l*) Section 6.
(*m*) Sections 7, 8.
(*n*) Section 14 (3).
(*o*) Section 14 (1).

(d) An insurer—who may reinsure to the extent of his liability (*p*).

(e) A bottomry bondholder—to the extent of the amount payable to him under the bond (*q*).

(f) A person who has advanced money for the ship's necessaries (*r*).

(g) A person advancing freight—if such freight is not repayable in case of loss (*s*).

(h) The master and crew may insure their wages (*t*).

An assignment of the interest of the assured in the subject-matter insured, does not, in the absence of express or implied agreement, transfer the rights of the assured under the policy (*u*).

GAMBLING POLICIES.

Where the assured has no insurable interest and no expectation of acquiring such an interest at the time of the contract, the policy is void. So are policies made "interest or no interest," or "without further proof of interest than the policy itself," or policies made "without benefit of salvage to the insurer," except in cases where there is no possibility of salvage (*x*).

Gambling on loss by maritime perils is now an offence punishable by fine or imprisonment. The prohibition extends to (i) contracts made by a person without having any bonâ fide interest in the safe arrival of the ship or the safety of the subject-matter insured,

(*p*) Section 9.
(*q*) Section 10.
(*r*) *Moran & Co.* v. *Uzielli*, [1905] 2 K. B. 555.
(*s*) Section 12.
(*t*) Section 11.
(*u*) Section 15.
(*x*) Section 4.

or a bonâ fide expectation of acquiring such an interest and (ii) to contracts made by any person in the employment of the shipowner (not being a part owner) where the contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any like term. Any broker through whom and any insurer with whom such a contract has been effected is also guilty of an offence, if he knew the nature of the contract (*y*).

DISCLOSURE AND REPRESENTATIONS.

A contract of marine insurance requires the utmost good faith, and if that be not observed by either party, the other party may avoid the contract (*z*).

It is the duty of the person intending to insure to communicate to the insurer every circumstance known to him or which in the ordinary course of business he ought to know, which is material to the risk, that is, every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk (*a*). The obligation to disclose extends to communications made to, or information received by the assured (*a*). Thus he should communicate news tending to show that a vessel is overdue, that it is damaged, or that it is lost (*b*). But there is no need to communicate knowledge which the underwriters are likely to know, such

(*y*) 9 Edw. 7, c. 12 (Marine Insurance (Gambling Policies) Act, 1909).

(*z*) Section 17. (*a*) Section 18.

(*b*) *Gladstone* v. *King* (1813), 1 M. & S. 35. See also s. 18.

as general trade customs, speculations as to war, tempest, etc., nor need the intending assured disclose his opinion on matters relating to the adventure (*c*).

A principal is deemed also to know, and to be bound by the non-communication of. circumstances within the knowledge, or which in the ordinary course of business ought to be within the knowledge of his agent (*d*). "It is a condition of the contract that there is no misrepresentation or concealment, either by the assured or by any one who ought as a matter of business and fair dealing to have stated or disclosed the facts to him, or to the underwriter for him" (*e*). But this must not be carried too far. Lord WATSON says (*f*): "The responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf."

Similarly, every material representation made by the assured or his agent during the negotiations for, and before the conclusion of, the contract must be true, or the assured may avoid the policy. A representation may be of fact, of expectation, or of belief. It is sufficient if a representation of fact be substantially correct, and if a representation of expectation or belief be made in good faith (*g*).

(*c*) *Carter* v. *Boehm* (1765), 1 Sm. L. C. (11th ed.) 491.

(*d*) Section 19.

(*e*) LINDLEY, L.J., in *Blackburn* v. *Vigors* (1886), 17 Q. B. D. 578.

(*f*) *Ibid.*, 12 App. Cas. 531, where the point was fully considered; and see *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144.

(*g*) Section 20.

THE POLICY.

The contract is not valid unless expressed in a policy of sea insurance (*h*). It must further specify: (1) The name of the assured, or of some person who effects the policy on his behalf; (2) the subject-matter insured and the risk insured against; (3) the voyage, or period of time, or both, as the case may be, covered by the insurance; (4) the sum or sums insured; and (5) the name or names of the insurers (*i*). In the case of a floating policy (*k*) the name of the ship may be communicated afterwards when cargo is insured, and the vessel in which it is to go is at the time of insuring not fixed upon. In such cases the insured should declare the shipment and the value of it as soon as he knows of it, and the policy attaches to the goods in the order in which they are shipped (*l*). Unless otherwise agreed, where a declaration of value is not made until after notice of loss or arrival the policy must be treated as unvalued (*i*). The policy must be signed by or on behalf of the insurer, and where a corporation insures it need not be under seal (*m*).

THE SLIP.

It is customary to draw up a memorandum of the terms, which is initialled by the underwriters before the

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93 (1). And see *Genforsikrings Aktieselskabet* v. *Da Costa*, [1911] 1 K. B. 137.

(*i*) Section 23.

(*k*) *I.e.*, a policy which describes the insurance in general terms and leaves the name of the ship to be defined by subsequent declaration. See also ss. 26, 29.

(*l*) Section 29.

(*m*) Section 24.

execution of the formal policy, and the general practice of the commercial community is to recognise this memorandum (called *The Slip*) as though it were the contract; but at law nothing can be sued upon but the stamped policy, and the slip can be looked at by the court for collateral purposes only (*e.g.*, to determine the date when the risk was undertaken (*n*)), nor does the initialling of the slip create a contract to enter into a policy (*o*). So a document called an "open cover," by which underwriters agreed to reinsure to the extent of excesses over certain amounts, risks taken by the original insurers, was held invalid both as a policy and as a contract to issue a policy, because it did not specify the "sum insured" (*p*).

KINDS OF MARINE POLICIES.

Among the most important divisions is that into *valued* and *unvalued* policies. In a valued policy the amount is fixed by agreement and stated in the policy (*q*). An *unvalued* policy is one which does not state the value of the subject-matter of the insurance; hence, after a loss, the amount to be paid by the underwriter remains a matter of assessment, subject to the limit of the sum insured (*r*).

Policies may also be divided into *voyage*, *time*, and *mixed*. A voyage policy is one which covers the

(*n*) Sections 21, 89.

(*o*) *Fisher* v. *Liverpool Marine Insurance Co.* (1874), L. R. 9 Q. B. 418. This will not apply to the case of a fire policy (*Thompson* v. *Adams* (1889), 23 Q. B. D. 361.

(*p*) *Home Marine Insurance Co.* v. *Smith*, [1898] 2 Q. B. 351; 3 Com. Cas. 172.

(*q*) Section 27. See *post*, p. 377. (*r*) Section 28.

subject-matter, "at and from" or from one place to another or others. A time policy covers it during a specified period, which must not exceed one year (*s*); but such a policy may contain a "continuation clause" to the effect that in the event of the ship being at sea, or in the event of the non-completion of the voyage at the expiration of the policy, the subject-matter of insurance shall be held covered until the ship's arrival, or for not more than thirty days thereafter. If the risk covered by the continuation clause attaches, either a new policy must be issued or the existing policy must be stamped in respect of the contract created by the continuation clause (*t*). A policy of insurance made to cover a ship under construction or repair or on trial, may be stamped as a voyage policy, although made for a time exceeding twelve months (*u*). A time policy, in which the voyage also is specified, is styled a mixed policy, *e.g.*, A. to X. for six months (*s*).

FORM OF MARINE POLICY.

The policy may be in print or writing, or partly written and partly printed. The form set out below is known as Lloyd's S. G. policy, and is the form of policy scheduled to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41). The notes which follow will, it is hoped, elucidate it.

S. G.

£——

BE IT KNOWN THAT *A. and or as Agent* as well in *his* own name as for and in the name and names of all and

(*s*) Section 25.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93, as amended by s. 11 of the Finance Act, 1901 (1 Edw. 7, c. 7).

(*u*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 8.

every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause *himself* and them, and every of them, to be insured (a), lost or not lost (b) at and from (c) *London*. Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the *Mary*, whereof is master under God, for this present voyage, *John Smith*, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called ; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship (c) upon the said ship, etc. and so shall continue and endure, during her abode there, upon the said ship, etc. ; and further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at *Melbourne* upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety (d) ; and upon the goods and merchandises, until the same be there discharged and safely landed (e). And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay (f) at any ports or places whatsoever *on the West Coast of Africa* without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at (g)

Touching the adventures and perils which we, the assurers, are contented to bear and do take upon us in this voyage : they are of the seas (h), men of war, fire (i), enemies, pirates (j), rovers, thieves (k), jettisons (l), letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people (m), of what nation, condition, or quality soever, barratry (n) of the master and mariners, and of all other perils (o), losses, and misfortunes, that have or shall come

to the hurt, detriment, or damage of the said goods and merchandises and ship, etc., or any part thereof ; and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance ; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured (p). And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving or preserving the property insured, shall be considered as a waiver, or acceptance of abandonment (p). And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises (q), confessing ourselves paid the consideration (r) due unto us for this assurance by the assured, at and after the rate of .

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in *London*.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded ; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent. ; and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent., unless general, or the ship be stranded (s).

Notes on the above Form of Policy.

(a) "*As well in his own name*," *etc.*—The words of the policy are sufficient to protect all persons who

possessed an insurable interest at the time of the insurance or acquired one during the risk; and under them a person interested, who did not authorise an insurance to be effected for him, may subsequently, even after the loss, adopt and claim the benefit of the insurance (*x*).

But it is not enough that the person claiming the benefit of the policy should be within the description of those insured, if the person effecting the policy did not in fact intend to insure on his behalf (*y*).

(b) "*Lost or not lost.*"—The words cover the assured, although the subject-matter of the insurance has been partially or entirely lost at the conclusion of the contract of insurance. These words incorporate an exception to the rule that the assured must have an insurable interest before the loss, an exception recognised at law. They also entitle the underwriter to his premium, whether the subject-matter has actually arrived safely or not (*z*). But if, when the contract is made, the assured is aware of the loss and the insurer is not, the policy is of no avail (*a*), neither can the underwriter retain the premium if he knows of the conclusion of the risk (*z*).

(c) "*At and from.*" "*Beginning the adventure on the said goods,*" *etc.*—These are the words which determine the time from which the insurer is on the risk. If the ship is insured "from" a place, the insurer's risk dates from the time when she starts on the voyage

(*x*) Section 86.

(*y*) *Boston Fruit Co.* v. *British and Marine Insurance Co.*, [1906] A. C. 336.

(*z*) Section 84 (3) (b). (*a*) Schedule I., r. 1.

insured (*b*) ; if she is insured "at and from," the risk dates from the time when the contract is concluded, if at that time she is in safety at that place ; otherwise, the risk commences from the time she arrives in good safety at that place (*c*). If freight is insured the risk, under the words "at and from," attaches immediately the ship is in good safety at that place, if the freight is chartered freight, otherwise it usually attaches *pro ratâ* as the cargo is loaded (*d*). Whether the ship is insured "at" or "at and from" it is an implied condition that she shall commence the venture within a reasonable time unless the delay was caused by circumstances known to the insurer before the conclusion of the contract, or the insurer has waived the condition (*e*). If a place of departure is mentioned, no risk will attach to the underwriter if the ship does not sail from that place (*f*). The insurer's risk on goods insured "from the loading thereof" does not attach until they are on board, the risk during transit from shore to the ship is on their owner (*g*). To meet this and the case of loss whilst unloading, a clause is often put in the margin of the policy to the following effect: "*including all risk of craft to and from the vessel.*"

(d) and (e) "*Until she hath moored,*" *etc.* "*Until the same be there discharged,*" *etc.*—These words are intended to fix the date of the cessation of the insurer's risk. Where the risk on goods continues until they are "safely landed," they must be landed in the customary

(*b*) Schedule I., r. 2.
(*c*) Schedule I., r. 3 (a), (b).
(*d*) Schedule I., r. 3 (c), (d).
(*e*) Section 42.
(*f*) Section 43.
(*g*) Schedule I., r. 4.

manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases (*h*). So, if it is customary at the port to land the goods by means of lighters, the risk continues until the goods are safely landed after transport in the lighters (*i*).

(f) "*To proceed and sail to and touch and stay*," *etc.*—It is the duty of the assured not to deviate, that is to say, not to go out of the proper course, as agreed or as prescribed by custom, between the termini of the voyage. Deviation, without lawful excuse, entitles the underwriter to avoid the policy, even though the ship has regained her course before any loss occurs, and the risk was not increased by such deviation (*k*). Deviation is excused if specially authorised by the policy, or if caused by circumstances beyond the control of the master or his employer, or if reasonably necessary to comply with a warranty ; or to ensure the safety of the ship, or to save human life ; or to obtain medical or surgical aid for any person on board, or if caused by barratrous conduct of master or crew, if barratry be a peril insured against (*l*) ; but a deviation for the mere purpose of saving property is not justifiable (*m*). The words quoted at the head of this note authorise the subject of insurance to proceed to and stay at certain ports mentioned in the policy, but not even to stay at such ports may the ship deviate from the voyage ; she may touch and stay at them in the course of the voyage

(*h*) Schedule I., r. 5.
(*i*) *Hurry* v. *Royal Exchange Co.* (1801), 2 Bos. & P. 430.
(*k*) Section 46.
(*l*) Section 49.
(*m*) *Scaramanga* v. *Stamp* (1880), 5 C. P. D. 295.

from the port of departure to the port of destination (*n*). Liberty given to a ship insured on a voyage from London to Plymouth to touch at any port in the English Channel will not excuse a call at Penzance, this last-named port being beyond the voyage in question, but it would allow a call at Newhaven in Sussex. If after the commencement of the risk the destination of the ship is voluntarily changed from that contemplated by the policy, this is a change of voyage, and not a mere deviation, and is not authorised by the clause now being considered (*o*). Where the destination is specified and the ship sails for a different destination, the risk does not attach (*p*). Further, if an insurance is effected for a particular voyage and there is a change of voyage, the insurer is discharged from the time when the determination to change is manifested, even though the ship be lost before she has actually changed the course of the voyage for which the insurance was effected (*q*) ; but a mere intention to deviate which is not carried into effect will not avoid the policy (*r*). Any hardship which cargo owners or others may suffer by this state of the law can be, and often is, met by a special clause inserted with the assent of all parties affected.

The voyage must be prosecuted with reasonable diligence and unjustifiable delay will discharge the insurer (*s*). The reason is that "the voyage commenced after an unreasonable interval of time, would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short a different voyage

(*n*) Schedule I., r. 6.
(*o*) Section 45 (1).
(*p*) Section 44.
(*q*) Section 45 (2).
(*r*) Section 46 (3).
(*s*) Section 48.

than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended" (*t*). Circumstances which excuse deviation will also excuse delay (*u*).

(g) "*Shall be valued at*," *etc.*—The value of the subject-matter as stated is accepted for the purposes of assessing compensation when a loss has happened as the true value, and is conclusive between the insurers and the assured except for the purpose of determining whether there has been a constructive total loss (*x*); unless there is evidence that the amount fixed was fraudulently stated, or intended by both parties as a mere wager. "An exorbitant valuation may be evidence of fraud, but when the valuation is bonâ fide, the valuation agreed upon is binding" (*y*). The effect of a valued policy may be illustrated by the case of *Balmoral Company* (*S.S.*) v. *Marten* (*z*). The defendant in that case insured a ship valued in the policy at £33,000. The ship incurred salvage expenses and a general average loss. In the salvage action the real value of the ship was proved to be £40,000, and in the average statement the rights of the parties were adjusted upon the footing that £40,000 was the contributory value of the ship. The insurers were held liable to make good to the owners only 33-40ths of the salvage and general average losses; that is, to pay in the proportion of the insured value to the contributory or salvage value.

(*t*) *Mount* v. *Larkins* (1832), 8 Bing. 122, *per* TINDAL, C.J.

(*u*) Section 49. See *ante*, p. 375. (*x*) Section 27.

(*y*) BOVILL, C.J., in *Barker* v. *Janson* (1868), L. R. 3 C. P. 306. See also *The Main*, [1894] P. 320.

(*z*) [1902] A. C. 511; 7 Com. Cas. 292.

(h) "*Perils . . . of the seas.*"—The clause in which these words occur defines the various dangers against loss in connection with which the insurers agree to indemnify the assured. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas, and does not include the ordinary action of the winds and waves (*a*). The indemnity is against accidents which may happen, not against events which must happen; nor need the loss be occasioned by extraordinary violence of the winds or waves. If a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category (*b*). A loss brought about by negligent navigation will be covered, if that which immediately caused the loss was a peril of the sea, even if the negligence is that of the assured himself, so long as it done not amount to wilful misconduct (*c*). Damage done by rats to a vessel which prevents her from sailing is not a peril of the sea; but if in consequence of the ravages of rats sea water enters the ship and damages the cargo, there is a loss by a peril of the seas (*d*).

(*a*) Schedule I., r. 7. Under perils of the seas are comprehended winds, waves, lightning, rocks, shoals, collisions, and in general all causes of loss and damage to the property insured, arising from the elements, and inevitable accidents, other than those of capture and detention (Phillips, s. 1099).

(*b*) *The Xantho* (1887), 12 App. Cas., at p. 509, *per* Lord HERSCHELL.

(*c*) *Trinder & Co.* v. *Thames, etc. Marine Insurance Co.*, [1898] 2 Q. B. 114; 3 Com. Cas. 123.

(*d*) *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518.

The case of *The Inchmaree* (*e*) should be noted. In that case a vessel was lying at anchor off the shore, about to proceed on her voyage ; the boilers were being filled by means of a donkey-engine ; owing to a failure on the part of somebody on board to see that a certain valve was open, the valve remained closed, and consequently, in the operation of pumping, water was forced back, split the air chamber, and disabled the pump. The House of Lords decided that the damage was not caused by "perils of the seas," nor by any cause similar to " perils of the seas," and that the insurers were not liable on the policy. In consequence of this decision a special clause—styled *The Inchmaree* clause—is now usually added to the policy, which meets such a case as this.

(i) "*Fire.*"—The peril insured against is not merely unintentional burning ; for instance, a fire voluntarily caused in order to avoid capture by an enemy is covered by the policy (*f*) : or a fire intentionally caused by a person other than the assured (*g*). A policy on goods will not cover any loss caused by a fire resulting from the condition in which they were shipped (*h*).

(j) "*Pirates.*"—The term includes passengers who mutiny and rioters who attack the ship from the shore (*i*). But the expression must be construed in its popular sense as meaning persons who plunder

(*e*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (1887), 12 App. Cas. 484.

(*f*) *Gordon* v. *Rimmington* (1807), 1 Camp. 123.

(*g*) *Midland Insurance Co.* v. *Smith* (1881), 6 Q. B. D. 561.

(*h*) *Boyd* v. *Dubois* (1811), 3 Camp. 133.

(*i*) Schedule I., r. 8.

indiscriminately for private gain and not persons who seize property for some public political end (*k*).

(k) "*Thieves.*"—Clandestine theft, or theft committed by any of the crew or passengers, is not included in the term "thieves" as used in this clause of the policy (*l*).

(l) "*Jettisons.*"—This means the throwing overboard of tackle or cargo to lighten the ship bonâ fide and in an emergency. As a rule the insurer is not liable to indemnify the owner of the goods if they were being carried on deck or in deck houses ; but custom of the trade or express agreement may throw the loss on the insurer (*m*).

(m) "*Arrests, restraints, etc. . . . of kings, princes and people.*"—This refers to political or executive acts, such as capture in time of war by an enemy, stoppage of neutral vessels suspected of carrying enemy's goods, embargo in time of peace, etc. (*n*). The mere operation of a municipal law preventing the delivery of goods at their destination (*e.g.*, the landing of cattle suffering from disease) is a "restraint of people" (*o*). The property of an alien enemy cannot of course be insured against capture during war with this country ; but if such property were insured and seized by the Government of the assured before an actual state of war existed, the subsequent breaking

(*k*) *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co.*, [1909] 1 K. B. 785.

(*l*) Schedule I., r. 9.

(*m*) *Milward* v. *Hibbert* (1842), 3 Q. B. 120.

(*n*) Schedule I., r. 10.

(*o*) *Miller* v. *Law Accident Insurance Co.*, [1903] 1 K. B. 712.

out of war would not invalidate the contract of insurance, although the right to recover would be suspended during the continuance of hostilities (*p*). The insurer is not liable under this heading for loss occasioned by riot, or by ordinary judicial process (*n*).

It is not unusual for insurers to stipulate by a special clause in the policy that they shall not be liable for loss caused by capture or seizure. This clause is known as the F. C. & S. clause (free of capture and seizure). It withdraws from the protection of the policy certain risks which would otherwise be covered. For instance, where in anticipation of war the Government of the South African Republic seized gold belonging to its own subject, it was held that there was a seizure within the meaning of the warranty and that the insurers were not liable on the policy (*q*).

When the policy contains a warranty of freedom from capture, the insurer's liability ceases on capture of the vessel. Thus, in a policy against total loss by perils of the sea, containing the F. C. & S. clause, a neutral ship carrying contraband during the Russo-Japanese war, was captured by the Japanese. While being navigated towards a Court of Prize, the ship was wrecked and became a total loss. She was afterwards condemned in the Prize Court. On a claim by the owners under the policy, it was held that when the ship was first seized there was a total loss by a capture, the lawfulness of which was authoritatively determined by a subsequent

(*p*) *Janson* v. *Driefontein Consolidated Mines*, [1902] A. C. 484; 7 Com. Cas. 268.

(*q*) *Robinson Gold Mining Co.* v. *Alliance Insurance Co.*, [1902] 2 K. B. 489; affirmed, [1904] A. C. 359.

decision of the Prize Court and that the *captors* and not the *assured* had lost the vessel by shipwreck. Accordingly, the owners failed to recover (*r*).

(n) "*Barratry of the master and mariners.*"—The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner or charterer (*s*). For example, setting fire to or scuttling a ship or employing it for smuggling (*t*) are barratrous acts.

(o) "*All other perils.*"—This means all other perils of a nature similar to those which have already been enumerated in the policy (*u*).

(p) "*In case of any loss or misfortune . . . waiver or acceptance of abandonment.*"—This is styled the "suing and labouring clause." The object is to encourage the insurer and the assured to do work to preserve after an accident the property covered by the policy, and to make the best of a bad state of affairs. Should they do so, the clause provides that their respective rights shall be in no wise prejudiced by any acts done in pursuance of such object, and that the assured shall be entitled to obtain his expenses consequent on the work from the insurers. But for this clause an assured might abstain from any attempt to safeguard wrecked property for fear that such conduct might be deemed a waiver of his right to abandon, although under such a clause it is his duty to take

(*r*) *Andersen* v. *Marten*, [1908] A. C. 334.

(*s*) Schedule I., r. 11; and see *Earle* v. *Rowcroft* (1806), 8 East, 126.

(*t*) *Cory* v. *Burr* (1883), 8 App. Cas. 393.

(*u*) Schedule I., r. 12.

reasonable measures to avert loss (*x*). General average losses and contributions and salvage charges are not recoverable under the clause, nor are expenses incurred to avert loss not covered by the policy (*y*). Moreover, if the insurer incurs expenses which, if they had been incurred by the assured, would have been recoverable from the insurer under the clause, the insurer cannot recover them from the assured (*z*).

(q) "*And so we the assurers*," *etc.*—This clause requires modification to adapt it to the needs of an underwriting limited liability company. Each insurer who signs, signs on his own behalf only, and agrees to indemnify the assured to an amount not exceeding the sum he places next his name. Where there is a loss recoverable under the policy, each insurer, if there be several, is liable for such proportion of the loss as the amount of his subscription bears to the valued or assessed amount of the loss; one insurer is not liable for another's default unless it be expressly so agreed (*a*).

(r) "*Confessing ourselves paid*," *etc.*—This recital is sometimes varied by stating that the persons negotiating the policy have agreed to pay; in either case, unless otherwise agreed, the broker is directly responsible to the insurer for the premium (*b*). The custom making the broker and not the assured liable to the insurer for the premium extends also to a "company's policy," which contains a promise by the assured to pay. Even

(*x*) Section 78 (4). (*y*) Section 78 (2), (3).

(*z*) *Crouan* v. *Stanier*, [1904] 1 K. B. 87.

(*a*) *Cf. Tyser* v. *Shipowners Syndicate* (*Reassured*), [1896] 1 Q. B. 135; 1 Com. Cas. 224.

(*b*) Section 53 (1). See *ante*, pp. 153, 154.

this does not make the assured directly liable to the insurer, for payment must be made according to the custom, *i.e.*, by the broker (*c*). In the absence of fraud, an acknowledgment on the policy of the receipt of the premium is conclusive as between the insurer and the assured, but not as between the former and the broker (*d*).

(s) "*N.B.*," *etc.*—This clause is styled the "memorandum"; its object is to prevent the insurers from being liable for loss on certain goods peculiarly liable to damage on a sea voyage, or for certain small losses which must almost necessarily occur, but which might increase the liability of the insurer beyond what he could calculate on. The meaning of the clause has been much considered, and it is believed that the result of the cases may be summarised thus: (i) the insurer is not liable to indemnify against a partial loss or damage to the first group of goods (viz., corn, fish, etc.) unless the loss is a general average loss (*e*), or unless the ship be stranded (*f*); (ii) he is not liable to indemnify against a partial loss or damage to the second group (viz., sugar, etc.) unless the damage amounts to five per cent. of the value of the thing damaged; (iii) he is not bound to indemnify against partial loss or damage to the ship, freight, or any goods other than the above, unless the loss amounts to three per cent. of the value of the thing lost or damaged, or

(*c*) *Universo Insurance Co. of Milan* v. *Merchants' Marine Insurance Co.*, [1897] 2 Q. B. 93; 2 Com. Cas. 28, 180.

(*d*) Section 54.

(*e*) See *post*, pp. 438—440.

(*f*) The term "average unless general," means a partial loss of the subject-matter insured, other than a general average loss, and does not include "particular charges."

unless it be a general average loss, or unless the ship be stranded. It should be stated that a general average loss may not be added to a particular average loss to make up the specified percentage (*g*) ; but in a voyage policy successive losses, though from different perils, may be added together for this purpose, and in a time policy successive losses occurring on the same voyage may be added together, but not losses occurring on distinct and separate voyages (*h*). The meaning of "stranding" in this memorandum is not always very clear ; it means that the ship has by some accident, or (at any rate) out of ordinary course (*i*), touched the sea bottom or something in immediate contact with it, and has thereby been retarded on her course for an appreciable length of time. The fact that the stranding has taken place renders the insurer liable (save to goods in class 2) for all losses on the goods, though happening before or after the stranding, and not attributable to it (*k*) ; but the goods must be actually on board at the time of the stranding (*k*). The words "sunk or burnt" are sometimes added at the end of the memorandum. In such case a ship is not "burnt" within the meaning of the policy, unless the injury by fire is such as to constitute a substantial burning of the ship as a whole (*l*).

Another clause, being an additional limitation of the insurer's liability, is of frequent occurrence ; it is styled the F. P. A. (free of particular average) clause,

(*g*) Section 76 (3).

(*h*) *Stewart* v. *Merchants' Marine Insurance Co.* (1886), 16 Q. B. D. 619.

(*i*) *Kingsford* v. *Marshall* (1832), 8 Bing., at p. 463.

(*k*) Schedule I., r. 14.

(*l*) *The Glenlivet*, [1894] P. 48.

and runs thus: "*Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse, rent, reshipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment. Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay damage or loss which may be proved to have directly resulted therefrom.*" Save in the matters specially referred to in this clause, the warranty "free from particular average" prevents the assured from recovering for a loss of part other than a loss incurred by a general average sacrifice: but if the policy covers parcels separately valued, or when by usage the contract is apportionable, the risk for loss of an apportionable part is on the insurer (*m*). This warranty does not exonerate the insurer from salvage charges or from liability under the suing and labouring clause, if expense be incurred to save the subject-matter of insurance from a loss for which the insurers would have been liable (*n*). Such expenses are termed "particular charges" (*o*).

A further clause, which is either printed in the body of the policy, or put in the margin, or otherwise attached to the policy, is the *Running Down Clause*, the object of which is to cover the shipowner from loss in the nature of damages payable by him by way

(*m*) Section 76 (1).

(*n*) Section 76 (2).

(*o*) Section 64 (2).

of compensation for collisions between his and other ships caused by the default of those in charge of his ship.

Reinsurance.

Reinsurance occurs when one insurer insures the risk he has undertaken with another insurer.

The law applicable is in the main the same as that which governs an original insurance. The reinsurer usually undertakes, with regard to the original policy, "to pay as may be paid thereon." These words do not create any liability unless the reinsured actually became bound to pay under the original policy; it is not sufficient that he should have paid in good faith in the belief that he was liable (*p*). A reinsurer need not give notice of abandonment (*q*). The doctrine of subrogation (*r*) applies to reinsurance, and the reinsurer is entitled to his proper proportion of any money which has been or could be recovered by enforcing a right that would diminish the loss of the original insurer (*s*).

Double Insurance.

A double insurance occurs when the assured effects two or more policies on the same interest and adventure. If the two together cause an over-insurance the excess cannot be recovered, but the assured may sue on whichever policy he desires, and may recover the whole

(*p*) *Chippendale* v. *Holt* (1895), 1 Com. Cas. 197.
(*q*) Section 62 (8); and see *post*, pp. 391, 392.
(*r*) See *ante*, p. 360, *post*, p. 395.
(*s*) *Assicurezioni Generali de Trieste* v. *Empress Assurance Corporation*, [1907] 2 K. B. 814.

sum to which he is entitled by way of indemnity (*t*). Where the policy is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured (*u*); and where the policy is unvalued, he must give the like credit as against the full insurable value (*x*). As between the insurers each is liable to contribute rateably his proportionate part (*y*), the assured holding any excess he may have received in trust for such of the insurers as are *inter se* entitled to it (*a*). Any insurer who pays more than his proportion of the loss is entitled to contribution from the other insurers in the same way as a surety who has paid more than his proportion of the debt (*y*).

ALTERATION OF A POLICY.

In accordance with the general principles of contracts an unauthorised alteration in a policy has the effect of making it void as against all who were not parties to the alteration (*b*). A material alteration by consent is usually made by indorsement signed by the parties, but (i) the alteration must take place before notice of the determination of the original risk; and (ii) must not extend the time beyond six months in the case of a policy made originally for less than six

(*t*) Section 32 (2) (a).
(*u*) Section 32 (2) (b).
(*x*) Section 32 (2) (c). For the mode of ascertaining insurable value, see s. 16.
(*y*) Section 80 (1).
(*a*) Section 32 (2) (d).
(*b*) *Ante*, pp. 89, 336.

months, nor beyond a year in any other case ; and (iii) no additional or further sum may be insured by the alteration (*c*).

Losses.

Except where otherwise agreed, the insurer is liable for any loss proximately caused by a peril insured against, even though the loss would not have occurred but for the negligence or misconduct of the master or crew. But he is not liable for ordinary wear and tear, nor for loss caused by inherent vice of the subject-matter insured, or by rats or vermin (*d*). Losses are of two kinds : *partial*, where the subject-matter of the insurance is only partially damaged, or where there is but an obligation to contribute to general average, and *total*, where the subject-matter is wholly destroyed, or has become so damaged that the owner is justified in abandoning it. Total losses are sub-divided into *actual total losses* and *constructive total losses*. An actual total loss occurs when the subject-matter is actually destroyed, or irreparably damaged, or where the assured is irretrievably deprived of it (*e*) ; *e.g.*, when a ship ceases any longer to be a ship, and becomes a mere bundle of planks ; or when goods are so damaged as to have ceased to exist in such condition or form as to answer the denomination under which they were insured ; or when lost to the owner by an adverse

(*c*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 96. The insertion of a continuation clause is now permissible, see *ante*, p. 370.

(*d*) Section 55. Subject to agreement, salvage charges incurred in preventing a loss by perils insured against, may be recovered as a loss by those perils (s. 65).

(*e*) Section 57 (1).

valid decree of a court of competent jurisdiction in consequence of a peril insured against (*f*). But possession restored after action brought does not disentitle the owners to recover as for a total loss (*g*).

Where the ship concerned is missing, her actual total loss may be presumed, if no news be received after the lapse of a reasonable time.

A constructive total loss occurs where the subject-matter insured is reasonably abandoned on account of its actual loss appearing to be unavoidable, or because it could not be preserved from actual loss without an expenditure which would exceed its value when the expenditure had been incurred (*h*). Thus, there is a constructive total loss where a vessel has sunk in deep water and cannot be raised without incurring an expense greater than her value (*i*), or when a ship has been so damaged that the cost of repair would exceed her value when repaired (*k*).

It has been recently decided by the House of Lords (*l*), but independently of the Act, that the assured is entitled to add the break-up value of the ship to the cost of the repairs in determining whether as a "prudent uninsured owner" he should repair her. It is open to question whether this decision will govern

(*f*) *E.g.*, sale by the Court of Admiralty (*Cossman* v. *West* (1888), 13 App. Cas. 160.

(*g*) *Ruys* v. *Royal Exchange Assurance Corporation*, [1897] 2 Q. B. 135; 2 Com. Cas. 201.

(*h*) Section 60 (1).

(*i*) Section 60 (2) (i); *Kemp* v. *Halliday* (1866), L. R. 1 Q. B. 520.

(*k*) As to taking general average contributions into account, see s. 60 (2) (ii); *Kemp* v. *Halliday*, *supra*.

(*l*) *Macbeth & Co., Limited* v. *Maritime Insurance Co.*, [1908] A. C. 144.

cases under the Act. Moreover, the insurers cannot by gratuitously intervening and incurring an expense which a prudent owner would not have done, convert a constructive total loss into a partial one; *e.g.*, by raising a vessel which has been sunk in deep water and abandoned by the assured (*m*).

Notice of Abandonment.

In every case of constructive total loss, notice of abandonment must be given; otherwise—unless notice be waived by the insurer—the loss will be considered as partial (*n*). A notice of abandonment must indicate the intention of the assured to abandon his insured interest unconditionally (*o*), *e.g.*, an owner cannot abandon part of a ship. The notice must be given with reasonable diligence after the receipt of reliable information, a reasonable time for inquiry being allowed where the information is of doubtful character (*p*), *i.e.*, at the earliest opportunity consistent with making inquiry as to the circumstances; and it must be given by the owner or a properly authorised agent. It need not be in writing (*q*).

Where notice of abandonment is properly given the assured is not prejudiced by the refusal of the insurer to accept it, but the notice is irrevocable after acceptance, express or implied, and acceptance is a conclusive admission of liability for the loss (*r*).

(*m*) *Sailing Ship Blairmore Co.* v. *Macredie*, [1898] A. C. 593; 3 Com. Cas. 241.

(*n*) Section 62 (1), (8). Notice of abandonment is also unnecessary where, at the time when the assured receives notice of the loss, the insurer could not possibly benefit by a notice (s. 62 (7)).

(*o*) Section 62 (2).

(*p*) Section 62 (3).

(*q*) Section 62 (2).

(*r*) Section 62 (4)—(6).

When an insurer receives valid notice of abandonment, he is entitled to stand in the place of the assured as to the subject-matter of the policy (*s*) ; hence, the effect of a proper notice of abandonment is to transfer the rights (including the right to any freight earned subsequently to the accident) formerly possessed by the assured to the insurer, and such transfer dates back to the time of the accident (*t*). If a ship is carrying the owner's goods, the insurer is entitled to reasonable remuneration for the carriage of the goods subsequent to the casualty causing the loss (*u*).

If after payment of the loss the vessel arrives safe, she is treated as having been abandoned, and becomes the property of the insurers (*v*).

ADJUSTMENT OF LOSSES.

The settlement between the assured and the insurer is styled the adjustment, and is usually settled on behalf of the parties by their brokers. If an insurer settles with the broker, the former is, according to Lloyd's rules, discharged as against the claims of the assured ; but at law this rule has not been fully recognised, nor, unless it can be shown that the assured was aware of the custom, is it likely that in future the courts will act on it (*x*).

Ship.—As to the amounts allowed (in the absence of express provision in the policy)—(i) In the case of a *partial loss* to the ship, the insurers will have to pay the cost

(*s*) Section 63.

(*t*) Section 63. See *Barclay* v. *Stirling* (1816), 5 M. & S. 6.

(*u*) Section 63 (2).

(*v*) *Houstman* v. *Thornton* (1816), Holt, N. P. 242.

(*x*) *Todd* v. *Reid* (1821), 4 B. & Ald. 210 ; *Burtlett* v. *Pentland* (1830), 10 B. & C. 760 ; but see *Stewart* v. *Aberdein* (1838), 4 M. & W. 211.

of the repairs less customary deductions (*a*), which means generally that they will pay two-thirds of the expenditure on the repairs, the other third being an arbitrary amount supposed to be equivalent to the gain obtained by the owner by the substitution of new materials and work for old. But on a first voyage they usually have to pay the whole. If the ship is not repaired, or only partially repaired, the assured is entitled to indemnity for the reasonable depreciation arising from the unrepaired damage ; but he cannot recover more than if the ship had been repaired (*b*). (ii) In the case of a *total loss*, if the policy is a valued policy, the amount payable is fixed in the policy. If the policy is unvalued, the amount payable is the full insurable value of the ship at the commencement of the risk (*c*), which includes outfit, stores, provisions, money advanced for seamen's wages, together with the cost of insurance (*d*). In the case of a steamer, "ship" includes machinery, boilers and coals, etc. (*d*).

Goods.—In the case of a total loss of goods, when the policy is unvalued, the assured may recover the insurable value, *i.e.*, the prime cost of the goods, plus expenses of shipping and insurance charges (*e*) ; if valued, then the amount agreed. In the case of a *partial* loss, subject to any agreement, where part of the goods is totally lost and the policy is valued, the sum recoverable is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable

(*a*) Section 69 (1).

(*b*) Section 69 (2), (3).

(*c*) Section 68. The sum recoverable is called the measure of indemnity, each insurer being liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy or to the insurable value (s. 67).

(*d*) Section 16 (1) ; Sched. I., r. 15. (*e*) Section 16 (3).

value of the whole, ascertained as in the case of an unvalued policy (*f*). Where part of the goods are lost and the policy is unvalued, the sum recoverable is the insurable value of the part lost (*g*). Where all or part of the goods arrive damaged, the assured is entitled to such proportion of the sum fixed (in the case of a valued policy), or of the insurable value (in the case of an unvalued policy), as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value (*h*).

General Average Loss.—Unless the policy expressly provides to the contrary, where the assured has incurred a general average (*i*) expenditure or suffered a general average sacrifice, he may recover from the insurer without enforcing his rights of contribution (*k*). Again, if the assured has paid or is liable for any general average contribution, he is, subject to any special terms of the policy and to the limit of the sum insured, entitled to be indemnified to the full amount of his general average contribution or to a proportionate part, depending on whether the subject-matter liable to contribution is or is not insured for its full contributory value (*l*). The same rule obtains where the assured is owner of the different interests, although in such a case there could be no contribution in fact (*m*).

(*f*) Section 71 (1). (*g*) Section 71 (2).

(*h*) Section 71(3). As to the meaning of "gross value," see s. 71(4).

(*i*) See *post*, p. 438, where the meaning of "general average" is given.

(*k*) Section 66 (4).

(*l*) Section 73. The insurer's liability for salvage charges must be determined on the like principle (*ibid.*). See *ante*, p. 377, as to mode of assessing amount payable under a valued policy for a general average loss.

(*m*) Section 66 (7).

In the absence of express stipulation, the insurer is not liable for any general average loss or contribution, which was not incurred for the purpose of avoiding a peril insured against (*n*).

Unless the policy otherwise provides, an insurer is liable for successive losses, even though the total amount may exceed the sum insured ; but a partial loss, not made good, followed by a total loss under the same policy, can only be treated as a total loss (*nn*).

Subrogation.

Where the insurer pays for a total loss either of the whole or in the case of goods of any apportionable part, he becomes entitled to the interest of the assured in the subject-matter insured, and is subrogated to all his rights and remedies therein ; and where an insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but is subrogated to the assured's rights and remedies therein, in so far as the assured has been indemnified by payment (*o*).

Thus, the insurer is subrogated to the rights of the assured only to the extent to which he has insured, the assured being entitled to benefit to the extent to which he has left himself uninsured. The following case will serve as an illustration : The owners of a schooner insured her for £1,000 under a policy stating her value to be £1,350. The schooner was totally lost in a collision with a steamship, and the insurers, having

(*n*) Section 66 (6). (*nn*) Section 77.

(*o*) Section 79 ; *North of England, etc. Association* v. *Armstrong* (1870), L. R. 5 Q. B. 244. See further as to subrogation, *ante*, p. 360.

paid the £1,000, sued the steamship owners and recovered £1,000, which was found to be the value of the schooner in the action :—*Held*, that the owners of the schooner were entitled to be treated as their own insurers for £350, and, therefore, the £1,000 must be divided between them and the insurers in the proportion of their respective interests, viz., $\frac{350}{1350}$ and $\frac{1000}{1350}$ (*oo*).

RETURN OF THE PREMIUM.

In the absence of fraud or illegality on the part of the assured or his agents, where the consideration for the payment of the premium totally fails the premium becomes returnable to him ; where the consideration partially fails, a proportionate part is returnable, but only if the premium is apportionable and there is a total failure of any apportionable part of the consideration (*p*). Thus premium, or a part of it, is returnable, if the policy is void or is avoided by the insurer from the commencement of the risk (*q*) ; if the subject-matter insured, or an apportionable part of it, is never subjected to the risk (*r*) ; if the assured had no insurable interest at any time during the currency of the risk and the policy was not effected by way of gaming or wagering (*s*). When the assured over-insures on an unvalued policy, a proportionate part of the premium is returnable (*t*). Where the assured has over-insured by double insurance a proportionate part

(*oo*) *The Commonwealth*, [1907] P. 216 ; and see s. 81.

(*p*) Section 84 (1), (2). (*q*) Section 84 (3) (a).

(*r*) Section 84 (3) (b). But if insured "lost or not lost," the fact that, unknown to the insurer, the ship had in fact arrived in safety at the date of the conclusion of the contract to insure, does not entitle the assured to a return of premium (*ibid.*).

(*s*) Section 84 (3) (c). (*t*) Section 84 (3) (e).

of the several premiums is returnable, except when the double insurance is effected knowingly by the assured ; and when the policies have been effected at different times, no premium is returnable in respect of any earlier policy which has borne the entire risk, or on which a claim has been paid in respect of the full sum insured (*u*).

WARRANTIES.

By a warranty the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or he affirms or negatives the existence of a particular state of facts (*x*). "A warranty in a policy of insurance is a condition or contingency, and unless that be performed there is no contract ; it is perfectly immaterial for what purpose a warranty is introduced, but being inserted the contract does not exist, unless it is literally complied with" (*y*). A warranty, therefore, when once introduced must be exactly complied with, whether it be material to the risk or not, otherwise subject to any express provision in the policy, the insurer will be discharged from the date of the breach of warranty, though the loss had nothing whatever to do with it (*x*), and though the breach of warranty arose owing to events beyond the control of the warrantor (*a*). A warranty may be express or implied ; and if express, must be inserted in or incorporated by reference into the contract (*b*).

(*u*) Section 84 (3) (f).

(*x*) Section 33.

(*y*) Lord MANSFIELD in *De Hahn* v. *Hartley* (1786), 1 T. R. 343, 345.

(*a*) *Hore* v. *Whitmore* (1778), 2 Cowp. 784.

(*b*) Sections 33, 35.

If, owing to a change of circumstances, the warranty no longer applies to the circumstances of the contract, or if it is rendered unlawful by legislation, a non-compliance with it is excused (*c*). Where a warranty has been broken, it is of no avail for the assured to remedy the breach and comply with the warranty before loss ; but the breach may be waived by the insurer (*c*).

A representation is a statement made by the assured to the insurer regarding the proposed risk, but it is not an integral part of the contract itself. If made, and if material, it must be substantially complied with (*d*). It seems then to differ in effect from a warranty in this, that whereas a misrepresentation if untrue entitles the insurer to avoid the policy only if it is material, a warranty avoids the contract under any circumstances ; and further, that whereas substantial compliance is sufficient in the case of a representation, strict compliance is needed for a warranty (*e*).

The more usual express warranties are—(1) to sail on a given day ; (2) that the vessel is safe on a particular day. This is complied with if the vessel is safe at any time on that day, though at the hour when the policy is signed she has been lost (*f*) ; (3) to sail with convoy ; (4) that the ship is neutral. This implies a condition that she shall be neutral at the commencement of the risk, and that, as far as the assured can control the matter, she will remain neutral during the

(*c*) Section 34.

(*d*) *De Hahn* v. *Hartley* (1786), 1 T. R. 343, 345.

(*e*) The subject is difficult, but it seems that the word "warranty" has not in insurance law the meaning it bears in general contract law.

(*f*) Section 38.

risk, and will carry the proper papers (*g*); (5) that the goods are neutral: which implies that they are neutral owned, and, so far as the assured can control the matter, that they will be carried to a neutral destination by a neutral ship (*g*).

The implied warranties are—(1) In a voyage policy, that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure (*h*). If the policy contemplates a voyage in different stages, involving different or varied risks, it will suffice if, at the commencement of each distinct stage, she is seaworthy in view of the risks to be encountered on the next stage (*i*). In a time policy there is no implied warranty of seaworthiness at any stage of the adventure (*k*). (2) In a voyage policy attaching whilst a ship is in port, an implied warranty that she is reasonably fit, at the commencement of the risk, to encounter the ordinary perils of that port (*l*). (3) In a voyage policy on goods, there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods (*m*). (4) That the venture is a lawful one, and will, so far as the assured can control it, be carried out in a lawful manner (*n*).

(*g*) Section 36.

(*h*) Section 39 (1). A ship is seaworthy if she is reasonably fit to encounter the ordinary perils of the seas in view of the adventure insured (s. 39 (4)).

(*i*) Section 39 (3); and see *Greenock Steamship Co.* v. *Maritime Insurance Co., Limited*, [1903] 2 K. B. 657. See also *post*, p. 420.

(*k*) Section 39 (5).

(*l*) Section 39 (2).

(*m*) Section 40. See *Daniels* v. *Harris* (1875), L. R. 10 C. P. 1.

(*n*) Section 41.

There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk (*o*); but if a ship is expressly warranted neutral there is an implied condition that, so far as the assured can control the matter, she shall be properly documented (*p*).

(*o*) Section 37. (*p*) Section 36 (2).

THE CONTRACT OF CARRIAGE.

This contract belongs to a group which is classed together under the head of Bailments (*a*); these include pledge, loan, and deposit. A bailment is defined by Sir William Jones (*b*) as "a delivery of goods in trust, on a contract express or implied that the trust shall be duly executed, and the goods re-delivered as soon as the time or use for which they were bailed shall have elapsed or be performed." The person who receives the goods is styled the *bailee*, the person who delivers them the *bailor*.

Common Carriers.

A common carrier is one who undertakes to carry for hire from place to place (*c*) the goods of any one who employs him. Such are the owners of carriages or barges taking goods regularly from town to town, also railway companies, to the extent to which they carry goods generally and by profession (*d*). But a person who conveys passengers only is not a common carrier (*e*), nor is a carman who does casual jobs under special contract (*f*), nor a wharfinger who carries his

(*a*) The law on this head is fully considered in *Coggs* v. *Bernard*, and the notes to it in 1 Sm. L. C. (11th ed.), 173.

(*b*) Law of Bailments, p. 117.

(*c*) *Nugent* v. *Smith* (1876), 1 C. P. D. 19, 423.

(*d*) *Johnson* v. *Midland Rail. Co.* (1849), 4 Ex. 367.

(*e*) *Christie* v. *Griggs* (1809), 2 Camp. 79, 81.

(*f*) *Brind* v. *Dale* (1837), 2 Moo. & R. 80; *Scaife* v. *Farrant* (1875), L. R. 10 Ex. 358. The case of a shipowner is dealt with hereafter, pp. 409, 415 *et seq.*

customers' goods by lighter from the ship to his warehouse (*g*).

Duties of a Common Carrier.—He must carry the goods of the class he professes to carry of anybody who delivers them to him, and who offers to pay reasonable hire (*h*). This duty of taking anybody's goods is that which makes him a common carrier, *i.e.*, a carrier common to all. He should carry the goods by his ordinary route, not of necessity the shortest, but without unnecessary deviation or delay (*i*) ; and should deliver them to the consignee, at the place (if any) designated by the consignor ; unless the consignee requires the goods to be delivered at another place, in which case he may deliver them according to the orders of the consignee (*k*) ; and if as between the consignor and the consignee there was a right in the former to change the destination of the goods, the carrier, on receiving due notice, must take the goods to the new destination if he carry there (*l*). As a rule, a land carrier should deliver at the consignee's house (*m*) ; a sea carrier, at some place of safety, notice of the locality being given by him to the parties (*m*).

(*g*) *Consolidated Tea, etc. Co.* v. *Oliver's Wharf*, [1910] 2 K. B. 395.

(*h*) *Garton* v. *Bristol and Exeter Rail. Co.* (1861), 1 B. & S. 112, at p. 162.

(*i*) *Briddon* v. *Great Northern Rail. Co.* (1859), 28 L. J. Ex. 51 ; *Myers* v. *London and South Western Rail. Co.* (1870), L. R. 5 C. P. 1.

(*k*) *London and North Western Rail. Co.* v. *Bartlett* (1862), 7 H. & N. 400.

(*l*) *Scothorn* v. *South Staffordshire Rail. Co.* (1853), 8 Ex. 341.

(*m*) *Cf. Hyde* v. *Trent and Mersey Navigation Co.* (1873), 5 T. R 389, 397.

He cannot be compelled to take the goods if his carriage is already full (*n*), nor if the goods are such as he cannot, or does not profess to convey (*o*); nor if they are of a nature such as to subject him to extraordinary risk (*p*).

A consignor who delivers goods of a dangerous character to a common carrier (although the consignor may be ignorant of the danger) impliedly warrants that the goods are fit to be carried with safety. This implied warranty does not arise in cases where the carrier knows of the danger. Thus, in *Bamford* v. *Goole and Sheffield Transport Co.* (*q*), the defendants, who were forwarding agents, delivered "ferro-silicon" in casks to a common carrier under the description of "general cargo," but did not inform him that it was ferro-silicon, although they were aware of the fact. The ferro-silicon during carriage gave off poisonous gases, which caused the death of the carrier. The judge found on the evidence that ferro-silicon was liable under certain conditions to be dangerous, that neither the defendants nor the carrier knew this, and that the defendants were not guilty of negligence in not knowing the dangerous character of the goods. The defendants were held liable in damages for causing the death of the carrier.

(*n*) *Batson* v. *Donovan* (1820), 4 B. & A., at p. 32.

(*o*) But a railway company may be compelled to convey, though it does not profess to take the class of goods as a common carrier; this depends on the Railway and Canal Traffic Acts. See *post*, p. 410.

(*p*) *Edwards* v. *Sherratt* (1801), 1 East, 604.

(*q*) [1910] 2 K. B. 94. Vaughan Williams, L.J., did not assent to the view that there was an implied warranty, and rested his judgment on the ground that it was the duty of the defendants to communicate such information as they had, and that by describing the goods as "general cargo," they were liable for breach of duty.

Liability for Loss or Damage.—At common law, the common carrier must make good any loss or damage whether or no it be caused by his negligence, for his agreement is to carry safely and securely, unless prevented by the act of God (*r*) or of the king's enemies. An act of God is some unforeseen accident occasioned by the elementary forces of nature unconnected with the agency of man or other cause, which could not have been prevented by the exercise of any foresight reasonably to be expected of the carrier (*s*). He is, in fact, in the "nature of an insurer" (*r*). A carrier who—though not a common carrier—takes goods in a ship without limiting his liability by agreement will, in this respect, be under the liabilities of a common carrier (*t*); with this exception one who carries goods, not being a common carrier, is bound only to carry with due care (*u*). The exceptions to the carrier's liability, whether those mentioned above or whether fixed by contract, do not avail him if the loss or damage to the goods is caused by his negligence, or if he do not provide a proper carriage (*x*).

He is responsible for the safety of the goods so long as they are in his custody; *i.e.*, during transit and (as his duty is usually to deliver as well as to carry) after transit for a reasonable time, varying with circumstances. After the lapse of such time he becomes

(*r*) *Forward* v. *Pittard* (1785), 1 T. R. 27.

(*s*) *Nugent* v. *Smith* (1876), 1 C. P. D. 423.

(*t*) *Hill* v. *Scott*, [1895] 2 Q. B., at pp. 376, 713; 1 Com. Cas. 140, 200.

(*u*) *Coggs* v. *Bernard* (1703), 1 Sm. L. C. (11th ed.), 173.

(*x*) *The Xantho* (1887), 12 App. Cas., at p. 510; and see *per* BOWEN, L.J., in *Steinman & Co.* v. *Angier Line*, [1891] 1 Q. B., at p. 624.

a mere depositee, and is liable only for negligence, unless otherwise agreed (*y*). If the consignee refuses to take the goods, the carrier must do what, in all the circumstances, is reasonable (*z*), and may recover expenses properly incurred in consequence of the refusal to accept delivery (*a*). It will be safer for him to give notice of the refusal to the consignor, though this will not be always necessary (*b*).

A carrier is not liable for damage or loss to goods which has arisen owing to the neglect of the owner, without negligence on the part of the carrier ; nor is he liable if the damage arises owing to an inherent vice in or natural deterioration of the goods delivered to be carried (*c*) ; and if from any cause (*e.g.*, the nature of the goods) special care is required, the carrier is entitled to be informed of this, otherwise he will not be liable for damage which but for such cause would not have occurred. In *Baldwin* v. *London, Chatham and Dover Rail. Co.* (*d*) rags were sent for transit to the company, and by mistake the company failed to send them in proper time to their destination ; the rags were packed wet, and were in consequence spoilt by the delay, but had they been dry, no damage would have been suffered. The court decided that in the absence of notice of the

(*y*) *Per* COCKBURN, C.J., in *Chapman* v. *Great Western Rail. Co.* (1880), 5 Q. B. D., at pp. 281, 282 ; *Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256.

(*z*) *Crouch* v. *Great Western Rail. Co.* (1857), 2 H. & N. 491 ; 3 H. & N. 183.

(*a*) *Great Northern Railway* v. *Swaffield* (1874), L. R. 9 Ex. 132.

(*b*) *Hudson* v. *Baxendale* (1857), 2 H. & N. 575.

(*c*) Unless, being aware of the facts, he does not do what is reasonable to prevent further loss (*Beck* v. *Evans* (1812), 16 East, 244, 247).

(*d*) (1882), 9 Q. B. D. 582.

state of the rags to the carriers, the company could not be held responsible to the plaintiffs for the loss, and that nominal damages would suffice to meet the damage suffered through their default.

Even at common law it was open to a carrier to agree with his customer that his liability should be limited. And though to bring about the limitation a contract was necessary, a general notice posted up, shown to have been seen by the customer, and to have been expressly or impliedly agreed to by him, sufficed. Thus, if the owner of the goods received a ticket, on which was a notice limiting the liability, this would have been strong, though not conclusive, evidence that he agreed to the terms (*e*).

The Carriers Act, 1830.—By the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68) (*f*), it is enacted: (1) That no common carrier by land (*f*) for hire shall be liable for loss or injury to certain articles when the value exceeds £10, unless at time of delivery the value and nature of the property shall have been declared, and an increased charge paid or agreed to be paid (*g*). Such notice must be express. Amongst the articles mentioned are gold, jewellery, watches, negotiable paper, pictures, china, and silk. The amount is taken as that of the aggregate value of the parcel. The pro-

(*e*) See the opinion of BLACKBURN, J., delivered in *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas., at p. 494; and see as to how far such notice will prove a contract, *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178; *Richardson & Co.* v. *Rowntree*, [1894] A. C. 217.

(*f*) This is applicable where the transit is *partly* by sea, if the loss occurs on land (*Le Conteur* v. *London and South Western Rail. Co.* (1866), L. R. 1 Q. B. 54).

(*g*) Section 1.

tection extends to cases where the goods are lost by the gross negligence of the carrier's servants (*h*). (2) All common carriers may demand on such packages an increased charge, but the amount per scale must be notified in legible characters in some conspicuous part of the office where the parcels are received. Such notice will bind those sending goods, whether or not it can be shown that it was brought to their knowledge (*i*). The exemption from the common law liability is given only where this notification and demand have been made (*k*), or when the declaration of value has not been given. When an extra charge is made, the person making payment is entitled to a receipt (*l*). (3) Other than as provided for by the Act, no public notice shall be allowed to limit the liability of carriers (*m*). (4) Special contracts are not affected by the statute if their provisions are inconsistent with the exemption in favour of carriers contained in s. 1 of the Act and that protection is announced : but the carrier is not deprived of the protection, unless the terms of the special contract are inconsistent with the goods having been received by him as a common carrier. Accordingly, the contract may render the carrier liable for the loss of the articles described in the first section beyond the value of £10, although their value may not have been declared. Special exemptions from liability introduced into the contract will not necessarily

(*h*) *Hinton* v. *Dibbin* (1842), 2 Q. B. 646.

(*i*) Section 2. A ticket containing conditions is not such a notice ; but may form the basis of a special contract (*Walker* v. *York and North Midland Rail. Co.* (1854), 2 E. & B. 750).

(*k*) *Great Northern Rail. Co.* v. *Behrens* (1862), 7 H. & N. 950.

(*l*) Stamping is dispensed with (s. 3).

(*m*) Section 4.

displace the character of common carrier (*n*). (5) A felonious act on the part of a servant of the carrier, or of a sub-contractor carrying for him (*o*), resulting in damage or loss to the goods, will render the carrier liable notwithstanding any other provision of the Act (*p*). To determine who are included under servants, see the section, and *Machu* v. *London and South Western Rail. Co.* (*q*), and *Stephens* v. *London and South Western Rail. Co.* (*r*).

The Act applies to a passenger's ordinary personal luggage which by the published regulations of a railway company he is entitled to have carried free of charge, so if the luggage contains articles over £10 in value of the kind enumerated in s. 1, the company will not be liable for their loss in the absence of a declaration of value (*s*).

It has been held in many cases that the carrier's exemption applies only in the case where there is loss (*t*) or injury to the goods; he is therefore liable as heretofore for what may be styled consequential damage, *e.g.*, damage from delay, circuity of route, etc.

(*n*) Section 6; *Baxendale* v. *Great Eastern Rail. Co.* (1869), L. R. 4 Q. B. 244.

(*o*) *Machu* v. *London and South Western Rail. Co.* (1848), 2 Ex. 415.

(*p*) Section 8.

(*q*) (1848), 2 Ex. 415.

(*r*) (1887), 18 Q. B. D. 121. As to the amount of evidence required to cause the court to infer that the theft was committed by a servant of the carrier, see *Vaughton* v. *London and North Western Rail. Co.* (1875), L. R. 9 Ex. 93; *McQueen* v. *Great Western Rail. Co.* (1875), L. R. 10 Q. B. 569.

(*s*) *Caswell* v. *Cheshire Lines Committee*, [1907] 2 K. B. 499.

(*t*) This includes a temporary loss (*Millen* v. *Brasch* (1883), 10 Q. B. D. 142).

Limitation of the Liability of Sea-carriers.—This is provided by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). This statute enacts that when loss or damage occurs to goods without any actual fault or privity on the part of the owner of the ship (*u*), he is not liable at all in the following cases: (i) when goods or other things on board are lost or damaged by reason of fire on board the ship (*x*); (ii) when gold, silver, diamonds, watches, jewels, or precious stones are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof, and when the shipowner or master had not at the time of shipment received a written declaration of their true nature and value (*y*). By s. 503 (*z*), a shipowner's (*u*) liability is limited in the cases mentioned below if the misfortune has occurred without his actual fault or privity: (i) where any loss of life or personal injury is caused to any person being carried in the ship; (ii) where any damage or loss is caused to any goods, merchandise, or other things on board; (iii) where any damage to person or property in or on another vessel, or to the other vessel itself, is caused by improper navigation of the ship. The limit in respect of loss of life or personal injury (with or without damage to vessels or goods) is an aggregate amount not exceeding £15 for each ton of the ship's tonnage (*a*), and in

(*u*) The word "owner" includes any charterer to whom the ship is demised (6 Edw. 7, c. 48, s. 71).

(*x*) This includes damage done by smoke, or water used in putting out the fire (*The Diamond*, [1906] P. 282).

(*y*) 57 & 58 Vict. c. 60, s. 502. This applies only to British sea-going ships.

(*z*) This section applies to foreign as well as British ships.

(*a*) See further, Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), as to calculation of tonnage of steamship.

respect of damage to vessels or goods (with or without loss of life or personal injury) an aggregate amount not exceeding £8 (*b*). The limitation of liability set by s. 503 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), has been extended to any loss or damage to property or rights of any kind, whether on land or on water, resulting from improper navigation or management of the ship without the actual fault or privity of the shipowner (*c*). If there are claims in respect of loss of life and loss of goods, the claims for loss of life will be entitled to £7 per ton, and the balance of the claims for loss of life and the claims for goods will rank equally against the remaining £8 (*d*). In the event of two unconnected collisions, the owners will be liable to pay damages up to the statutory limit in each case (*e*). The fault of one part owner does not take away the right of another part owner to limit his liability (*f*).

Railway Companies.—A railway company is not a common carrier of passengers; and is liable for damage caused to them only when the accident is due to the negligence of the company's servants (*g*). Railway companies are common carriers only of goods which they profess to carry as such (*h*). But as regards other goods,

(*b*) The Act provides for the method of calculating the tonnage for this purpose.

(*c*) 63 & 64 Vict. c. 32, s. 1.

(*d*) *The Victoria* (1888), 13 P. D. 125.

(*e*) 57 & 58 Vict. c. 60, s. 503 (3).

(*f*) *The Obey* (1866), L. R. 1 A. & E. 102.

(*g*) See (*e.g.*) *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379.

(*h*) *Dickson* v. *Great Northern Rail. Co.* (1887), 18 Q. B. D., at p. 185.

their liability for neglect or default (*i*) is dealt with by the Railway and Canal Traffic Act, 1854 (*k*), which provides that every railway company shall afford reasonable facilities for receiving, forwarding, and delivering traffic, and "shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants (*l*), notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void." But it is further provided that companies may make conditions with respect to the receiving, forwarding, and delivery of any animals, goods, or other things, if the court or judge before whom any question relating thereto shall be tried, considers them just and reasonable. And no greater damages may be recovered for the loss of or any injury done to the animals beyond the sums hereinafter mentioned, *e.g.*, for any horse £50 [and so on], unless the person sending or delivering the same to such company shall, at the time of delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess

(*i*) Theft by a servant of the company is not *per se* negligence or default (*Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373).

(*k*) 17 & 18 Vict. c. 31, s. 7, extended subsequently to steamboats and to other vessels owned by railway companies.

(*l*) *Quâ* carriers, not when acting in any other capacity (*Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 75).

of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge ; and such percentage or increased rate of charge shall be notified in the manner prescribed in the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), and shall be binding upon such company in the manner therein mentioned. It is further provided that "no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage : Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under [the Carriers Act, 1830], with respect to articles of the description mentioned in the said Act."

An important discussion arose at one time with regard to the special contract required by this Act. Did writing signed exclude the clause requiring the condition to be reasonable, and did a reasonable condition exclude the necessity of signature? The point was eventually decided in *Peek* v. *North Staffordshire Rail. Co.* (*m*), when the House of Lords declared that the condition must be just and reasonable, *and* embodied in a signed written contract. What is or is not reasonable depends, of course, on circumstances ; thus, in one case the condition was that "the company would not be responsible for any injury or damage, however caused," and this was considered unreasonable, for it would

(*m*) (1863), 10 H. L. Cas. 473.

protect even against gross negligence (*n*) ; in another, it was a condition that the company would not be responsible for luggage unless fully and properly addressed with the owner's name and destination, this was held to be unreasonable (*o*) ; but when the consignor is burdened with a condition which *per se* is unreasonable, and at the same time has the offer of a just and reasonable alternative contract, then, if he takes the former, he will be bound by it (*p*).

Section 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), also applies to goods which the railway company is under no obligation to carry. Thus, an agreement to allow commercial travellers to take samples by passenger train, free of charge, on condition that the company should be relieved from all liability for loss, is not binding in the absence of a signed contract. The condition is void and the company must make good any loss (*q*).

By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 14, it is enacted that where a company, by through booking, contracts to carry any animals, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage arising from the act of God, the king's enemies, fire, accidents from machinery,

(*n*) *McManus* v. *Lancashire, etc. Rail. Co.* (1859), 4 H. & N. 327.

(*o*) *Cutler* v. *North London Rail. Co.* (1882), 19 Q. B. D. 64 ; and see *Dickson* v. *Great Northern Rail. Co.*, and the cases there cited, 18 Q. B. D. 176.

(*p*) *Great Western Rail. Co.* v. *McCarthy* (1887), 12 App. Cas. 218.

(*q*) *Wilkinson* v. *Lancashire and Yorkshire Rail. Co.*, [1907] 2 K. B. 222.

boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, shall be good, and shall be considered to be incorporated in the contract, if printed legibly on the receipt or freight note, and published in a conspicuous position in the booking-office.

Railway companies must forward goods without delay or partiality, and cannot give preferential rates so as to handicap any other company or persons. Powers are given by the Railway and Canal Traffic Acts, 1873 and 1888, to a commission, to hear complaints, and to make such orders as may, under the circumstances, be right.

A fruitful source of litigation is the loss of a passenger's personal luggage, which is being or has been carried in a train. A railway company appears to be a common carrier of such luggage, and therefore an insurer of its safety (*r*). But this is not so if the luggage has been taken by the passenger out of the control of the company. The company's porters frequently take charge of luggage, and the difficulty is to know when they are so acting as agents of the company, and when of the passenger. The luggage is deemed not to be in the company's possession if it be given to a porter an unreasonable time before the train starts; nor if a reasonable time has elapsed since the passenger arrived at the journey's end and the luggage was placed at his disposal (*s*).

(*r*) *Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31; and see *Richards* v. *London, Brighton, etc. Rail. Co.* (1849), 7 C. B. 839.

(*s*) *Hodgkinson* v. *London and North Western Rail. Co.* (1885), 14 Q. B. D. 228.

Rights of the Carrier.—These are to have the goods delivered to him, and to have his remuneration paid. The payment must be reasonable, but at common law it need not be uniform. He may claim it in advance, *i.e.*, before he carries, but not before he receives the goods (*t*). The carrier has a lien for his charges on the goods carried in respect of which the claim arises, but it is a particular and not a general lien (*u*).

THE CONTRACT OF AFFREIGHTMENT.

This contract has for its object the carriage of goods in vessels for a price called "freight." It is found in two forms: (i) Charter-party; (ii) The contract for the conveyance of goods in a general ship, which contract is embodied in a bill of lading. These two contracts have many incidents in common. Sometimes a charter-party and bills of lading co-exist, especially where the charterer may desire to have an opportunity of assigning the goods whilst they are still in course of carriage. Sometimes the charterer (*i.e.*, the person who hires the ship from the shipowner) uses the ship as a general ship, carrying goods of third parties under bills of lading. The terms of the contract of carriage are, as between the shipowners and the charterer, usually to be gathered from the charter-party, and where there is a bill of lading as well, its primary use (as between these parties) is simply to serve as a receipt for the goods shipped on board under the contract as contained in the charter-party. As regards assignees

(*t*) *Pickford* v. *Grand Junction Rail. Co.* (1841), 8 M. & W. 372.
(*u*) *Rushworth* v. *Hadfield* (1805), 6 East, 519; 7 East, 224: *Skinner* v. *Upshaw* (1702), 2 Ld. Raym. 752.

of the bill of lading, the bill of lading contains the terms of the contract of carriage made with the shipowners, and unless the bill of lading refers to and incorporates with itself any or all of the terms of the charter-party, the assignee is not affected by the charter-party (*x*). Thus, if the bill of lading contains a statement, "freight and all other conditions as per charter-party," the terms of the charter-party govern the payment of freight and all other conditions which would have to be performed by the receiver of the goods, so far as these are not in conflict with any express stipulations of the bill of lading; but conditions of the charter-party are not incorporated which do not concern the consignee, so the shipowner will be liable to the assignee of a bill of lading for damage to a cargo carried on deck, although under the charter-party it was so carried at merchant's risk (*y*).

Charter-Party.

"An agreement by which a shipowner agrees to place an entire ship, or a part of it, at the disposal of a merchant for the conveyance of goods, binding the shipowner to transport them to a particular place, for a sum of money, which the merchant undertakes to pay as freight for their carriage." This is the definition given in Maude and Pollock on Shipping (*z*). The person whose goods are to be taken is called the charterer.

(*x*) See *per* ESHER, M.R., and BOWEN, L.J., in *Oriental Steamship Co.* v. *Tylor*, [1893] 2 Q. B., at pp. 521, 526.

(*y*) *Serraino* v. *Campbell*, [1891] 1 Q. B. 283; *Diederichsen* v. *Farquharson*, [1898] 1 Q. B. 150; 3 Com. Cas. 87.

(*z*) Page 289.

The charter-party may, but need not, be under seal, but must be stamped (*a*). It may amount to a complete demise of the ship ; that is to say, it may put the vessel altogether out of the power and control of the owner, and vest that power and control in the charterer, so that during the hiring the ship is to be regarded as the vessel of the charterer and not of the owner (*b*) ; but generally, the ship remains in the possession of the owner, the charterer acquiring the right only to put his goods on the vessel, and to have them carried (*c*). The question is one of construction.

The following form (*d*) will show the stipulations ordinarily inserted :

> "It is this day mutually agreed between Messrs. [*A. B.*], agents for owners of the good ship or vessel called [*The James Scott*], A1, and newly coppered of, etc., of the burden of 340 tons (*e*) register measurement or thereabouts, whereof [*C. D.*] is master, now at [*Malta*] (1), and Messrs. [*E. F. of Liverpool*], merchants, that the said ship being tight, staunch, and strong, and every way fitted for the voyage (2), shall with all convenient speed proceed to London (*f*) and there load (3) in the usual and customary manner a full and complete cargo (4) of lawful merchandise [*say about* 400 *tons in weight*], and therewith proceed to [*Hong Kong or Shanghai*] as ordered before sailing, or so near thereunto as she may safely get (5), and there deliver the same in the usual manner (6) agreeably to bills of

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 49—51, and Sched. I.

(*b*) Lord HERSCHELL in *Baumwoll, etc.* v. *Furness*, [1893] A. C., at p. 14.

(*c*) *Sandeman* v. *Scurr* (1867), L. R. 2 Q. B. 86, 96.

(*d*) Certain trades have forms peculiar to themselves.

(*e*) This should not be omitted, but a bonâ fide mistake in it will not vitiate the contract, unless it be shown that under the circumstances the error is very considerable and material.

(*f*) As to the effect of deviation, see *post*, p. 426.

lading; after which she shall load there, or if required proceed to one other safe port [*in China*] and there load always afloat (7) in the usual and customary manner from the agents of the said charterers a full and complete cargo of tea or other lawful merchandise, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture (4), the cargoes being brought to and taken from alongside the vessel at the charterers' risk and expense, which the said merchants bind themselves to ship, and being so loaded shall therewith proceed to [*Liverpool or London*] as ordered on signing bills of lading abroad, or so near thereto as she may safely get (5), and there deliver the same in the usual and customary manner (6) to the said charterers or their assigns, they paying freight for the same at the rate of [£7 10*s. per ton of fifty cubic feet*] for tea delivered, for the round out and home; a deduction of [5*s. per ton*] to be made if ship be discharged and loaded at [*Hong Kong*], other goods, if shipped, to pay in customary proportion; in consideration whereof the outward cargo to be carried freight free; payment whereof to become due and be made as follows: [*then follow terms*]. Ship is to have liberty to put on board 80 tons of [ ], or other dead weights, and to retain it on board during the voyage. Thirty running days (Sundays and holidays excepted) are to be allowed the said merchant if the ship is not sooner dispatched for loading in [*London*], and forty-five like days (8) for all purposes abroad, and ten days on demurrage (8) over and above the said lay days and the time herein stated, at [£10 *sterling per day*], paying day by day as the same shall become due. The time occupied in changing ports not to count as lay days. Charterers' liability under this charter-party to cease on the cargo being loaded, the master and owners having a lien on cargo for freight and demurrage (9). The master to sign bills of lading at such rates of freight (10) as may be required by the agents of the charterers, without prejudice to this charter-party.

"The act of God, the King's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, throughout the voyage, being excepted (11).

"The vessel to be consigned to charterers' agent abroad, free of commission. On the return of the ship to [*Liverpool*], she shall be addressed to [*G. H. & Co.*] brokers or to their agents, at any other port of discharge. Penalty for non-performance of this agreement, the estimated amount of freight."

Notes on the Form of Charter-party.

The clauses of the above may be more intelligible if read with the aid of the following notes:

(1) "*Now at*," *etc.*—This is an important statement; there is, it will be observed, no stipulation as to the time when the ship shall be handed over to the charterer. But if he knows where the ship is at the date of the charter-party, he can tell approximately when it will be at his disposal at the agreed place. For this reason the statement in reference to the place of the ship is generally construed as a condition precedent, the falsity of which entitles the charterer to rescind (*g*).

(2) Seaworthiness and fitness to receive cargo are implied terms. The shipowner when he enters into a charter-party impliedly warrants that the ship is reasonably fit to encounter the perils of navigation and to carry the cargo (*h*). These implied conditions extend respectively only to seaworthiness at the time

(*g*) *Bentsen* v. *Taylor & Sons*, [1893] 2 Q. B. 274.

(*h*) *Steel* v. *State Line Steamship Co.* (1878), 3 App. Cas. 72; *McFadden* v. *Blue Star Line*, [1905] 1 K. B. 697.

of sailing, and to fitness at the time of loading, and they do not continue in force after the ship has sailed or the goods are once on board (*i*). But if a voyage is of necessity divided into stages, *e.g.*, to take in coal, the vessel must be made seaworthy at the commencement of each stage (*j*). If the ship is unseaworthy at the commencement of the voyage, the shipowner, although liable for damage to cargo caused directly as the result of that unseaworthiness, is not liable for damage caused by a peril of the sea excepted in the bill of lading. The contract of affreightment is not displaced by the shipowner's breach of warranty of seaworthiness, and the shipowner is not thereby reduced to the position of a common carrier (*k*). Other implied conditions are (i) that the voyage will be commenced and carried out without unreasonable delay; and (ii) that there shall be no unnecessary deviation. These obligations impose a duty on the shipowner not to expose the ship to unnecessary risk. Thus, where an owner carelessly allowed goods destined for an alien enemy to be loaded with those of the plaintiff and as a result the ship was seized and detained by the naval authorities, the owner was held liable for the consequent delay in delivery of the plaintiff's goods (*l*).

(3) The owner must bring his ship to the agreed or usual place of loading at the port where the voyage is to commence, unless the charter makes provision otherwise; the charterer must, when he has notice that the

(*i*) See note (*h*) on p. 419.

(*j*) *The Vortigern*, [1899] P. 140; 4 Com. Cas. 152.

(*k*) *The Europa*, [1908] P. 84. The position of the shipowner is different when he commits a breach of the undertaking not to deviate. See *post*, p. 426.

(*l*) *Dunn* v. *Bucknall Bros.*, [1902] 2 K. B. 614; 7 Com. Cas. 33.

ship is ready to load, bring his goods alongside the ship at such place, and deliver them to the servants of the shipowner (*m*). In the absence of express stipulation in the charter-party, the charterer is liable for not producing a cargo, though he be not personally in fault in failing to do so (*n*). As a rule, the shipowner is responsible for proper stowage (*o*), but the exceptions are numerous.

(4) But for this provision, a shipowner paid at a rate per ton of the cargo, might find that owing to waste of space his freight has not come up to what he had contemplated. If the ship is described in the earlier part of the document as "of the burden of 340 tons measurement or thereabouts," and the words "full and complete cargo" are unqualified, the charterer does not fulfil his obligation by putting on board a cargo of 340 tons, if in fact the ship will take more; nor does he make himself liable by putting less than 340 tons on board if she cannot take that quantity (*p*). Sometimes the charter-party runs thus: "a full and complete cargo, say [about 1,100] tons"; in such a case the charterer's obligation will be satisfied if he loads to about three per cent. in excess of the 1,100 tons, though the ship's capacity is over 1,200 tons (*q*). But the word "cargo" alone, in the absence of anything in the charter-party to qualify it, means the entire load of the vessel, and

(*m*) *Per* SELBORNE, L.C., in *Grant* v. *Coverdale* (1884), 9 App. Cas., at p. 475.

(*n*) *Grant* v. *Coverdale*, *supra*, is a good example.

(*o*) *Blaikie* v. *Stembridge* (1859), 6 C. B. (N.S.) 894.

(*p*) *Hunter* v. *Fry* (1819), 2 B. & Ald. 421; *Morris* v. *Levison* (1876), 1 C. P. D. 155.

(*q*) *Morris* v. *Levison*, *supra*; *cf. Miller* v. *Borner*, [1900] 1 Q. B. 691; 5 Com. Cas. 175, where the charterer contracted only to load a "cargo of ore, say about 2,800 tons," not a "full and complete cargo."

therefore the omission of the words "full and complete" are often immaterial (*r*). On the other hand, subject to the stipulations of the charter-party, it is an implied condition that the shipowner shall not use the ship in a manner prejudicial to the charterer, *e.g.*, he cannot load bunker coal intended for a future voyage so as to prevent the charterer having full advantage of the ship (*s*).

(5) The shipowner cannot usually compel the consignee to take delivery until the ship has reached the place named, but it may be that she cannot safely reach it. These words, "as near thereunto as she can safely get," enable him to demand that the cargo be unloaded before arriving at the named place, if she is prevented from getting there by some permanent obstacle which cannot be overcome by the shipowner within such time as according to all the circumstances of the case may reasonably be allowed (*t*).

(6) "The liability of the shipowner as to the commencement of the unloading is to use all reasonable dispatch to bring the ship to the named place where the carrying voyage is to end, unless prevented by excepted perils, and when the ship is there arrived, to have her ready with all reasonable dispatch to discharge in the usual or stipulated manner" (*u*). The consignee or

(*r*) *Borrowman* v. *Drayton* (1877), 2 Ex. D. 15; *Jardine Matheson & Co.* v. *Clyde Shipping Co.*, [1910] 1 K. B. 627; *cf. Miller* v. *Borner*, [1900] 1 Q. B. 691, where on the construction of the particular charter-party the omission of the words "full and complete" was held to be material.

(*s*) *Darling* v. *Raeburn*, [1906] 1 K. B. 572; affirmed, [1907] 1 K. B. 846.

(*t*) BRETT, L.J., in *Nelson* v. *Dahl* (1879), 12 Ch. D., at p. 592.

(*u*) BRETT, L.J., in *Nelson* v. *Dahl*, *supra*, at p. 584.

charterer must take the cargo from alongside, and for that purpose provide the proper appliances for taking delivery there (*x*) : the shipowner should put the cargo on the rail of the ship, and in such a position that the consignee can take it. If the owner of goods imported in any ship from foreign parts fails to land or take delivery of the same, at the time agreed (or if no time is agreed, within seventy-two hours, exclusive of a Sunday or holiday), from the time of the report (*y*) of the ship, the shipowner may land or unship the goods and place them at certain places according to circumstances. The shipowner may, by giving written notice to the person in whose custody the goods are placed, retain his lien for freight on the same, and then, subject to certain conditions, the person with whom the goods are deposited may, and if required by the shipowner shall, if the lien is not discharged as provided by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), at the expiration of ninety days from the time when the goods were placed in his custody (or earlier if they are perishable), sell by public auction sufficient of the goods to satisfy the Customs dues, the expenses, and the freight (*z*).

(7) "*Always afloat*" means that the ship shall be sent to a port in which she can safely lie with her full cargo without touching the ground. If to the knowledge of the shipowner, owing to the state of the tides, there may not be sufficient depth of water for the ship

(*x*) *Dahl* v. *Nelson*, *per* Lord BLACKBURN (1881), 6 App. Cas., at p. 43.

(*y*) *I.e.*, the report required by the Customs laws.

(*z*) Merchant Shipping Act, 1894, ss. 492—501.

to load always afloat, the charterer will not be responsible for delay thereby occasioned (*a*).

(8) "*Demurrage*" properly signifies the agreed additional payment (generally per day) for an allowed detention of the ship, whilst loading or unloading, beyond a period specified in or to be collected from the charter-party; it also means compensation by way of unliquidated damages for undue detention not provided for specially in the instrument (*b*). The former is the strict meaning. The freighter who agrees to pay demurrage for detention beyond the lay days will have to pay so long as the ship is in such a condition that she cannot be handed back to the use of the shipowner, though the delay be not caused by the freighter's default (*c*). If no lay days are mentioned, the charterer is liable to pay damages if he detains the ship beyond what, in the actual circumstances, is a reasonable time (*d*). But in either case, if the delay is due to the default of the owner or of those for whom the owner is responsible, the charterer is not liable to pay (*e*). The lay days, *i.e.*, the days allowed for loading or unloading, begin when the ship arrives at the place agreed upon in the charter-party, and the charterer has notice that she is ready to load or unload; they run continuously, each day being counted from midnight to midnight, and not periods of twenty-four hours (*f*). If the vessel is not discharged within the lay days, a part of

(*a*) *Carlton Steamship Co.* v. *Castle Mail Packets Co.*, [1898] A. C. 486; 2 Com. Cas. 286.

(*b*) BOWEN, L.J., in *Clink* v. *Radford*, [1891] 1 Q. B., at p. 630.

(*c*) ESHER, M.R., in *Budgett* v. *Binnington*, [1891] 1 Q. B. 38.

(*d*) *Hick* v. *Rodocanachi*, [1891] 2 Q. B. 626; [1893] A. C. 22.

(*f*) *The Katy*, [1895] P. 56.

a day counts as a whole day (*g*); but where the charterer is bound to load at a certain rate "per weather-working day," and bad weather prevents work, any time less than half a day will not count as more than half a day (*h*). After the lay days have expired, demurrage becomes payable at the rate provided by the charter, or if the charter does not apply, as unliquidated damages.

(9) This clause is styled the cesser clause, and it puts an end to the charterer's liability when the cargo is loaded, the shipowner relying on his lien in order to get payment. Unless obviously contrary to the intention of the parties, the court so construes it that the exoneration of the charterer and the acquisition of the right of lien may be coextensive; in other words, the cesser clause does not affect liabilities in respect of which the shipowner cannot secure himself by the exercise of the right of lien (*i*).

(10) Freight is dealt with hereafter. See *post*, p. 435.

(11) The effect of this clause is to exonerate the shipowner from liability for loss occasioned by the causes enumerated in it, if it was not due to negligence on the part of the shipowner or of those for whom he is responsible (*k*). If the ship is unseaworthy when she starts and damage results, the excepted perils clause will not save the shipowner from responsibility for damage (*l*).

(*g*) *Commercial Steamship Co.* v. *Boulton* (1875), L. R. 10 Q. B. 346.

(*h*) *Branckelow Steamship Co.* v. *Lamport and Holt*, [1897] 1 Q. B. 570; 2 Com. Cas. 89.

(*i*) *Clink* v. *Radford*, [1891] 1 Q. B. 625; *Hansen* v. *Harrold*, [1894] 1 Q. B. 612.

(*k*) See *The Xantho* (1887), 12 App. Cas. 503; *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518.

(*l*) *Gilroy* v. *Price*, [1893] A. C. 56.

"The act of God" has already been defined. See *ante*, p. 404.

"King's enemies"; this exception applies only to foreign enemies, and not to traitors, pirates, robbers, etc. (*m*).

"Restraints of princes and rulers"; *e.g.*, blockades, embargoes.

"Perils [dangers and accidents] of the seas"; damage caused by the sea, storms, collisions, etc., of an unexpected nature; thus, damage caused by sea-water entering through a hole eaten by rats is an excepted peril, but direct injury to the cargo by rats is not (*n*).

The excepted perils clause frequently contains many matters other than those mentioned in the charter-party above, viz.: "pirates, robbers, or thieves" [which does not apply to thefts committed by persons in the service of the ship (*o*)], "barratry of master or mariners," "negligence of master and mariners," "jettison," and so on.

If the shipowner deviates from the prescribed voyage, the special contract by charter-party is displaced as from the beginning of the voyage, no matter when or where the deviation took place, and the shipowner cannot rely on the excepted perils clause, although the loss or damage to cargo cannot be traced to the deviation (*p*); even though the deviation was reason-

(*m*) *Forward* v. *Pittard* (1785), 1 T. R. 27, 34.

(*n*) *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518.

(*o*) *Steinman & Co.* v. *Angier Line, Limited*, [1891] 1 Q. B. 619.

(*p*) *Joseph Thorley* v. *Orchis S.S. Co.*, [1907] 1 K. B. 660; *Internationale Guano en Superphosphaatwerken* v. *Robert Macandrew & Co.*, [1909] 2 K. B. 360.

ably necessary for the safety of the ship, if the necessity arose from the wrongful act of the shipowner in sending the ship to sea in an unseaworthy condition (*q*).

A charter-party, like any other contract, is governed in its construction by ordinary rules of law ; if there is a latent ambiguity, evidence is admissible to show in what sense it was used, and if any words used have a technical meaning, then evidence is also admissible to show the meaning in which the words were used. The contract by charter-party is to be construed in a liberal way, the written parts of a partly-printed document being, as a rule, preferred to the printed part, so as to get as near as may be to the exact intention of the parties.

Bill of Lading.

A bill of lading is a document acknowledging the shipment of goods, and containing the terms and conditions upon which it has been agreed that they are to be carried (*r*). It is excellent evidence of the contract for the carriage of goods on a general ship, *i.e.*, a ship which is used for the carriage of the goods of several merchants who may desire to have them conveyed by her, and which is not employed for the carriage of a charterer's goods only. A bill of lading is generally used, even when the ship is chartered. If the charterer finds the cargo himself, the bill of lading is usually, but not always, a mere receipt for the goods given by the

(*q*) *Kish* v. *Taylor*, [1911] 1 K. B. 625. As to the effect of a breach of warranty of seaworthiness on the contract of carriage, see *ante*, pp. 419, 420.

(*r*) *Caldwell* v. *Ball* (1786), 1 T. R. 216.

master. If the charterer takes the goods of others, the bill of lading contains the contract he makes with them (*s*). The form of a bill of lading varies much according to the practice of the parties thereto, but a usual form is as follows:

> "Shipped in good order and condition by , in and upon the good ship called the 'British Tar,' whereof is master for this present voyage, and now in the port of , and bound for , with liberty to call at any ports on the way for coaling or other necessary purposes, fifty casks of wine being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of , the act of God, the King's enemies, fire, barratry of the master and crew, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever kind or nature soever excepted, unto or to his assigns, he or they paying freight for the said goods £ per ton, delivered with primage and average accustomed. In witness whereof, the master of the said ship hath affirmed to bills of lading all of this tenor and date, one of which bills being accomplished, the others to stand void.
>
> "Dated, etc.
>
> "Weight, value, and contents unknown."

A bill of lading for goods to be exported or carried coastwise must bear a stamp value sixpence, which must be impressed before execution (*t*). A bill of lading for goods shipped abroad need not be stamped.

Many matters already mentioned in connection with charter-parties apply equally to bills of lading. Several

(*s*) See *ante*, pp. 415, 416.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 40.

of these are mentioned in the notes to the form of charter-party given above (*u*). There is, however, this difference : a shipowner, when the contract is contained in a charter-party, may have duties to perform before the time of shipment of the goods ; this is not so often the case when the contract is evidenced by a bill of lading only.

The bill of lading is signed generally by the master, though in practice, where the goods are shipped, the acknowledgment first given is a less formal receipt ("*mate's receipt*"), which is afterwards exchanged for a bill of lading signed by the master : but there is nothing to prevent the giving of a bill of lading without production of the mate's receipt, if the goods are on board, and if there is no interest in them known to the master except that of the shipper (*x*). The shipowner is justified in delivering bills of lading to the holder of the mate's receipt if he has not notice of other claims (*y*). If the mate's receipts and the bills of lading get into different hands the goods must be delivered to the holder of the bill (*z*).

The master, when he signs, affixes his signature as agent of the owners of the vessel ; except that when a vessel has been chartered, and the charterers put up the vessel as a general ship, then the master may be agent of the charterer and not of the owner, the decision in each case depending upon the facts. If the ship has been demised (*a*) to the charterer, the master

(*u*) *Ante*, pp. 419 *et seq.*
(*x*) *Hathesing* v. *Laing* (1874), L. R. 17 Eq. 92.
(*y*) *Evan* v. *Nichol* (1842), 3 M. & G. 614.
(*z*) *Baumwoll, etc.* v. *Furness*, [1893] A. C. 8.
(*a*) See *ante*, p. 417.

is generally the charterer's agent (*b*), but the mere fact that the charter-party provides that the master shall be the agent of the charterer does not of itself bind those who deal with the ship without actual notice of this clause (*c*). The law on this subject may be stated in the words of COCKBURN, C.J., in *Sandeman* v. *Scurr* (*d*); "where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made."

(*b*) *Baumwoll, etc.* v. *Furness*, [1893] A. C., at p. 14.

(*c*) *Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539; 1 Com. Cas. 39.

(*d*) (1867), L. R. 2 Q. B. 86, 97.

Thus, where charterers put up a vessel as a general ship, and plaintiff put on board wine, and received bills of lading in ordinary form signed by the master, the owners were held liable for loss by leakage arising from improper stowage, it being questioned whether an action would not lie also against the charterers (*e*). But if the charter-party amounts to a demise of the vessel, then the master frequently signs as agent of the charterer, who is for the time being the owner of the vessel (*f*). An indorsee of the bill of lading, who takes it bonâ fide, and for value, and without notice of the charter-party, may hold the shipowner to the terms of the bill of lading; but if this indorsee was aware of the charter-party when he took the bill, the shipowner will not be bound if the bill of lading was signed without the shipowner's authority (*g*).

The master has no authority to sign a bill of lading for goods not actually received on board (*h*), and if he does so, the owners are not liable; but his signature is primâ facie evidence against the owners that the goods were shipped, and it lies on the owners to rebut this evidence if they allege that the goods never were on board (*i*); and by express stipulation the bill of lading may be made conclusive evidence against the shipowners of the quantity shipped (*k*). As regards the master's liability, by the Bills of Lading Act, 1855,

(*e*) L. R. 2 Q. B. 86.

(*f*) L. R. 2 Q. B. 96; and see *Baumwoll, etc.* v. *Furness*, [1893] A. C. 8.

(*g*) *The Patria* (1872), L. R. 3 Ad. & Ec. 436.

(*h*) *McLean* v. *Fleming* (1872), L. R. 2 H. L. Sc. 128; *Grant* v. *Norway* (1851), 10 C. B. 665.

(*i*) *Smith* v. *Bedouin Steam Navigation Co.*, [1896] A. C. 70.

(*k*) *Lishman* v. *Christie* (1887), 19 Q. B. D. 333.

"every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped" (*l*). But even the master will not be liable if—(i) the holder of the bill at the time of receiving it is aware that the goods have not been actually shipped; or (ii) the misrepresentation in the bill was caused by the fraud of the shipper, the holder, or of some person under whom the holder claims (*m*). Neither does the section estop the shipowner from showing that goods incorrectly described in the bill of lading by mere marks of identification, having no significance in respect of their quantity, quality, or commercial value, are in fact the goods which were shipped under the bill of lading (*n*).

In giving a bill of lading the master can bind the shipowners by any terms which it falls within his express or implied authority to make, subject to this, that if the ship is chartered, he may not sign bills of lading varying the terms of the charter, unless the charter itself so allows, or unless he obtains express instructions to do so (*o*).

The general duty cast upon the shipowner is to carry the goods with safety, subject to any limitations agreed upon. Such limitations are (*e.g.*) exceptions from

(*l*) 18 & 19 Vict. c. 111, s. 3.

(*m*) Section 3; and see *Valieri* v. *Boyland* (1866), L. R. 1 C. P. 382.

(*n*) *Parsons* v. *New Zealand Shipping Co.*, [1901] 1 Q. B. 548; 6 Com. Cas. 41.

(*o*) *Rodocanachi* v. *Milburn* (1887), 18 Q. B. D. 67.

liability for damage caused by the "act of God and the King's enemies," "accidents from machinery," etc. Others are mentioned, and the law has been discussed in considering the corresponding proviso in a charter-party (*p*).

When the bill states that the goods are shipped "in good order and condition," it is called a *clean* bill of lading. These words refer to the apparent and external condition, and, though they are not words of contract, the master can bind his owners by such a statement, and if it be untrue the latter will be liable in damages to an indorsee of the bill of lading who suffers loss by acting on the faith of the representation (*q*).

A bill of lading is not only a document containing the terms of a contract of carriage, it is in addition a document of title; it is the symbol of goods at sea, and remains so until the goods have come to the hands of a person entitled under the bill of lading to the possession of them (*r*). The person to whom the bill is made out may transfer his rights under it; if the bill is drawn to order, he does so by indorsing the bill and delivering it to the assignee; if he merely indorses it, the indorsement is in blank, and the bill then passes from hand to hand, as though it were drawn to bearer, the holder being entitled to fill up the blank as he chooses (*s*). If the bill is drawn to a specified person without the addition of the words "or order or assigns," it seems

(*p*) *Ante*, pp. 425, 426.

(*q*) *Compania Naviera Vasconzada* v. *Churchill*, [1906] 1 K. B. 237.

(*r*) *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317.

(*s*) *Per* Lord Selborne, in *Sewell* v. *Burdick* (1885), 10 App. Cas., at p. 83. See also the special verdict in *Lickbarrow* v. *Mason* (1793), 1 Sm. L. C. (11th ed.), at p. 721.

not to be negotiable in any sense of the term. Consequently, where a bill of lading can be transferred by indorsement and delivery or by delivery, the transferee is entitled to demand possession of the goods as owner or pledgee according to the nature of the transaction (*t*).

The transfer of a bill of lading drawn to order, though it passed the goods, did not until 1855 transfer the right to sue on the contract. But by the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, it was provided that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." It has been decided that the pledge of a bill of lading does not *per se* pass the property (*t*) within the meaning of this section, so that the pledgee is not liable to pay the freight; but the case is otherwise if the pledgee exercise his right to take possession of the goods (*t*).

The master must deliver the goods to the consignee upon payment of freight; or if the bill has been properly assigned, then he should deliver to the holder of the bill. Sometimes the bill of lading is executed in duplicate or triplicate, and the different parts may get into the hands of different persons; in such case the first transferee for value is entitled to the goods (*u*).

(*t*) *Sewell* v. *Burdick* (1885), 10 App. Cas. 74.
(*u*) *Barber* v. *Meyerstein* (1867), L. R. 2 C. P. 38, 661; 4 H. L. 317.

But the master who, acting bonâ fide and without notice of conflicting claims, delivers to a holder who presents any of the parts of the bill of lading to him, is not liable if it should prove that that holder is not the first transferee (*x*). This is a consequence of the clause found in bills of lading drawn in a set: "one of these bills of lading accomplished, the other shall stand void."

If the master has notice of conflicting claims, it is his duty to interplead.

The "negotiability" of a bill of lading has been dealt with (*y*), and also the effect of indorsement of the bill of lading on the unpaid vendor's rights (*a*).

Freight.

Freight is the name given to the reward paid to the shipowner for the carriage of goods. It is not payable until the voyage has been completed and the goods delivered, unless non-delivery is caused by the fault of the shipper alone, or by the perils excepted in the charter-party or bill of lading (*b*). Sometimes it is stipulated that the payment shall be made before this time, in which case, unless otherwise agreed, the failure of the voyage gives no right to the return of the money. "Advance freight," if payable, is due at the moment of starting, unless otherwise agreed; even if not paid it can be recovered by the shipowner from the charterer

(*x*) *Glyn, Mills & Co.* v. *East and West India Docks* (1882), 7 App. Cas. 591.

(*y*) *Ante*, p. 296.

(*a*) *Ante*, p. 275, 276, 297.

(*b*) *Liddard* v. *Lopes* (1809), 10 East, 526.

upon the loss of the ship (*c*). But if any goods are destroyed before the ship sails so as to make it impossible that any freight could be earned on them, advance freight will not be payable on the portion of the cargo destroyed (*d*). Each case depends upon its own circumstances, and to these it is necessary to look to determine whether a given payment is intended as freight in advance, or as a loan; and though it be called "freight in advance," it by no means follows as of course that it is such (*e*). The amount of freight is arranged for in the charter-party or bill of lading. It may be a fixed sum (lump freight), or it may be at a certain rate per ton. If the charterer fails to load a full cargo according to agreement, he is liable in damages; such damages are styled "dead freight" (*f*).

Freight pro ratâ.—This is the term given to a payment which is sometimes made for carriage of goods when the contract has been performed in part only. The rule is thus set out in Maude and Pollock on Shipping (*g*): "If the original contract has not been performed, no claim can arise under it; but if there is a *voluntary* acceptance of the goods at a point short of their destination, in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with, a new contract will be implied to pay compensation commensurate with the benefit actually

(*c*) *Byrne* v. *Schiller* (1871), L. R. 6 Ex. 319; and *per* ESHER, M.R., in *Smith & Co.* v. *Pyman & Co.*, [1891] 1 Q. B., at p. 744.

(*d*) *Weir & Co.* v. *Girvin & Co.*, [1900] 1 Q. B. 45: 5 Com. Cas. 40.

(*e*) *Allison* v. *Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209, 217, 233.

(*f*) *McLean* v. *Fleming* (1872), L. R. 2 H. L. Sc. 128.

(*g*) (4th ed.), p. 368.

received ; that is to say, to pay freight for that portion of the voyage which has actually been performed."

Shipowner's Lien.—The shipowner possesses a lien upon the goods which he carries, until he has received payment of freight. The lien extends to all the property consigned on the same voyage by the person from whom the freight is due (*h*) ; it ceases upon delivery of the goods. In many cases it may be inconvenient to retain them on board, and yet if landed the lien upon them would be in danger of being lost ; this difficulty is provided for by certain sections of the Merchant Shipping Act, 1894 (*i*). The shipowner has a lien for general average (*k*) contributions, and also for expenses incurred in protecting the goods (*l*). The lien for freight and general average is a possessory lien ; the lien for the expenses is a maritime lien. In the absence of agreement or usage giving a lien, there is no lien for dead freight (*m*).

Average.

Average is of two kinds :

(1) *Particular Average* arises whenever any damage is done to the property of an individual by accident or otherwise, but which is not suffered for the general benefit, *e.g.*, loss of an anchor, damage by water to cargo. These losses remain where they fall, and no extraordinary compensation is granted in respect of them.

(*h*) *Sodergren* v. *Flight* (1796), quoted 6 East, p. 622.
(*i*) See *ante*, p. 423.
(*k*) *Post*, p. 438.
(*l*) *Hingston* v. *Wendt* (1876), 1 Q. B. D. 367.
(*m*) See Scrutton on Charter-parties, Arts. 149 *et seq.*

(2) *General Average.*—A general average loss is caused by or directly consequential on a general average act, which occurs where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure. The loss must be borne rateably by all interested (*n*).

The essentials of a general average sacrifice are (1) that it was incurred to avoid a danger common to all interests (*o*) ; (2) that it was necessary to incur some sacrifice (*p*) ; (3) that it was voluntary (*q*) ; (4) that it was "a real sacrifice and not a mere destruction or casting off of that which had become already lost and consequently of no value" (*r*) ; (5) that the ship, cargo, or some portion have actually been preserved (*p*) ; (6) the danger must not be one which arises through the default of the interest demanding a general average contribution (*s*). The last rule, however, does not apply to cases where the loss is brought about by the inherent vice of the subject-matter sacrificed. Thus, where coal shipped without any negligence, caught fire owing to its liability to spontaneous combustion, and water was poured into the holds to extinguish the fire, the owners of the coal were held entitled in respect of damage done by water to the coal which was not ignited, to a general average contribution from the ship (*t*).

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (1), (2), (3).

(*o*) *Nesbitt* v. *Lushington* (1792), 4 T. R. 783.

(*p*) *Pirie* v. *Middle Dock Co.* (1881), 44 L. T. 426.

(*q*) *Shepherd* v. *Kottgen* (1877), 2 C. P. D. 589.

(*r*) *Per* WILLIAMS, J., in *Pirie* v. *Middle Dock Co.* (1881), 44 L. T., at p. 430 ; *Iredale* v. *China Traders' Insurance Co.*, [1899] 2 Q. B. 356 ; 4 Com. Cas. 256.

(*s*) *Strang* v. *Scott* (1889), 14 App. Cas. 601.

(*t*) *Greenshields, Cowie & Co.* v. *Stephens & Sons*, [1908] 1 K. B. 51.

Ordinary cases of loss which amount to a general average loss are: jettison of cargo (*u*); voluntary stranding to avoid wreck; damage to cargo by scuttling the ship to extinguish fire; repairs rendered necessary by collision (*x*).

Whatever comes under the head of general average loss must be shared by those who have been in a position to be benefited by the sacrifice, *e.g.*, the owners of the ship, and the freight, and "all merchandise put on board for the benefit of traffic must contribute"; but the wages of the seamen are not affected. Accordingly, cargo which has been landed to ensure its safety and not for the purpose of lightening the ship, is not liable to contribute in respect of a general average loss subsequently incurred; such cargo was not then at risk, and derived no benefit from the sacrifice (*y*). It is the duty of the master to retain the cargo until he has been paid the amount due in respect of it for general average.

The rules relating to the amounts to be made good vary in different countries. In the absence of agreement, adjustment of the amounts to be contributed in respect of general average will take place at and according to the law of the port of discharge, *i.e.*, in general, the place to which the vessel is destined, unless the voyage is justifiably terminated at an intermediate port (*z*). But a temporary suspension of the voyage at a port of refuge does not justify an average adjustment

(*u*) If cargo stowed on deck is jettisoned, there is no right of general average contribution from the other interests, unless deck stowage is allowed by express agreement or by custom of the trade or port.

(*x*) *Plummer* v. *Wildman* (1815), 3 M. & S. 482.

(*y*) *Royal Mail Steam Packet Co.* v. *English Bank of Rio Janeiro* (1887), 19 Q. B. D. 362.

(*z*) *Simonds* v. *White* (1824), 2 B. & C. 805.

there (*a*). It frequently happens that, in marine insurance policies, the underwriter agrees to be liable for general average "as per foreign statement": this binds him as to the correctness of the statements of the foreign average stater, and to accept as general average whatever is such according to the law of any foreign place at which the adjustment is properly made (*b*). A set of rules intended to be the basis of a uniform practice in all countries was adopted in 1877; this set—known as the York-Antwerp rules—is frequently adopted in contracts of affreightment and marine insurance.

(*a*) *Hill* v. *Wilson* (1879), 4 C. P. D. 329.

(*b*) *Marro* v. *Ocean Marine Insurance Co.* (1875), L. R. 10 C. P. 414.

SURETYSHIP AND GUARANTEES.

Nature and Formation of the Contract of Guarantee.

A GUARANTEE is an engagement to be collaterally answerable for the debt, default, or miscarriage of another person. Such an agreement may be intended to secure the performance of something immediately connected with a mercantile transaction, or it may be to secure the fidelity of a person about to be appointed to some office, or it may be to secure one person from harm resulting from the torts of another (*a*); or it may relate to numerous other matters. In the present chapter it is proposed to deal with guarantees relating to mercantile transactions only.

An agreement to answer for the debt, default, or miscarriage of another need not be in any special form; but as the contract is one within the provisions of s. 4 of the Statute of Frauds, it is not enforceable by action unless it is evidenced by a written memorandum of the agreement signed by the party sought to be made liable under it (*b*). The contents of a memorandum sufficient to satisfy the statute have been already stated (*c*); but it is not necessary that the memorandum of a guarantee should contain any statement of the consideration given

(*a*) See, *e.g.*, *Kirkham* v. *Marter* (1819), 2 B. & Ald. 613.
(*b*) See Statute of Frauds, *ante*, p. 5.
(*c*) *Ante*, pp. 6 *et seq.*

to the guarantor in return for the guarantee (*d*). This last statement must not be misunderstood. It is not intended to import that consideration to the guarantor is unnecessary; as in all other contracts consideration must be given to the promiser (*e*), save when the guarantee is under seal. What is meant is that the document signed by the guarantor may comply with the Statute of Frauds, although this consideration be not mentioned or indicated in it.

As a guarantee is for practical purposes almost useless unless it be evidenced by the proper writing, it becomes necessary to consider the main features of a guarantee. They are (as applied to mercantile transactions), it is conceived, the following:

The contract of guarantee involves the existence of another contract, one party to which is a party to the contract of guarantee; in fact, there must be two contracts, one party being common to each. That party is the creditor; to him the principal debtor is or is about to be under a liability on the principal contract; and to him the guarantor or surety is to be liable if the principal debtor breaks the principal contract.

The contract is not a guarantee within the statute if the collateral or suretyship contract is not made with the creditor (*f*), and there must be an absence of any

(*d*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3. Before this Act a statement of consideration in the writing was necessary.

(*e*) *Barrell* v. *Trussell* (1811), 4 Taunt. 117. The consideration may be, and often is, forbearance to sue the debtor. See, *e.g.*, *Crears* v. *Hunter* (1887), 19 Q. B. D. 341.

(*f*) *Eastwood* v. *Kenyon* (1840), 11 A. & E. 438; *Re Hoyle*, [1893] 1 Ch., at p. 99.

liability on the part of the surety, except such as arises from his express promise (*g*).

Thus, if A. says to B., referring to C., who is asking B. to sell goods to him, C., "Let him have the goods; if he does not pay you, I will," this is an offer of a guarantee on the part of A. (*h*). Should he say, "Give C. the goods, I will be your paymaster," the result is not of necessity the same; for the words may show an intention on A.'s part to pay for the goods in any event, and not merely (*h*) if C. fails to pay. A question of fact is involved in this illustration (*i*).

There are contracts for which no writing is required, which approach in characteristics closely to guarantees; and these various contracts were classified and distinguished by the Court of Appeal in the recent case of *Harbury, etc. Co.* v. *Marten* (*k*). The object of the contract must be regarded, and if the payment of another's debt is only involved as an incident of a larger purpose, that fact will not bring it within the Statute of Frauds. A person who, having purchased goods subject to a lien, obtains delivery upon a verbal promise to pay off the lien, will be bound: his object is to free the goods from an incumbrance, not to pay another's debt (*l*). In like manner the employment of a *del credere* agent requires no writing, although under the terms of that employment the agent may become

(*g*) Williams' Saunders, 211 c., note (*l*).

(*h*) *Birkmyr* v. *Darnell* (1704), 1 Sm. L. C. (11th ed.) 299.

(*i*) Compare *Birkmyr* v. *Darnell*, *supra*, with *Matson* v. *Wharam* (1787), 2 T. R. 80; and see the judgment of Willes, J., in *Mountstephen* v. *Lakeman* (1872), L. R. 7 Q. B. 197.

(*k*) [1902] 1 K. B. 778.

(*l*) *Fitzgerald* v. *Dressler* (1860), 7 C. B. (N.S.) 374.

answerable for the debt of another (*m*). Certain "indemnities" must be distinguished from guarantees, although of course the creditor in all guarantees is indemnified against loss by the surety. The case of *Guild* v. *Conrad* (*n*), may serve to illustrate this distinction. The defendant in that case orally promised the plaintiff that, if the plaintiff would accept certain bills for a firm which the defendant desired to assist, the defendant would provide the plaintiff with funds to meet the bills. The defendant was held liable on the ground that the promise was to indemnify the plaintiff against the liability incurred by accepting the bills, independently of the question whether the firm, which was primarily liable, made default or not.

LIABILITY OF THE SURETY.

The amount of a surety's liability is fixed by the terms of the contract; sometimes a specified sum is payable as liquidated damages; more generally the amount upon breach is determined as in the case of the principal contract. The surety's liability (which arises, as has been stated, only on the principal's default) is limited to the amount which the surety has undertaken to pay on such default. This may be the whole amount due by the principal debtor, or it may be something smaller beyond which it has been agreed that the surety's liability shall not extend.

If the guarantee is one which the surety has entered into jointly with others, he is still liable to pay the

(*m*) *Couturier* v. *Hastie* (1856), 8 Ex. 40; *Sutton* v. *Gray*, [1894] 1 Q. B. 285.

(*n*) [1894] 2 Q. B. 885.

whole amount he has agreed to pay on the debtor's default, unless the wording of the guarantee otherwise provides. His right of contribution against co-sureties may be a partial indemnity, but he cannot, in the absence of agreement binding the creditor, compel the creditor to proceed against the other sureties. It seems also that the surety cannot insist that the creditor shall sue the debtor before resorting to him, even upon giving an indemnity against the cost and delay of such proceedings. The surety is not bound by any decision as to the liability of the debtor in actions to which he was not a party, and may insist (at his own risk as to costs) that the right of the creditor shall be proved against himself (*o*).

Upon the construction of the contract there is sometimes a question whether or not the guarantee is continuing, *i.e.*, whether it is intended to continue until recalled, or whether it is to be confined to a single transaction or debt. If A. guarantees B. to the extent of any goods he may purchase from C., not exceeding £150, he may mean to guarantee the money due on all B.'s purchases provided that they never exceed £150, or he may intend to guarantee B. until he has obtained £150 worth of things, and then stop. Each case must be decided on the language of the document, and the presumed intention of the parties, for no definite rule can be drawn from the decisions (*p*). Thus, in *Allnutt* v. *Ashenden* (*q*), the agreement ran: "I hereby guarantee B.'s account with A. for wines and spirits to the amount

(*o*) *Ex parte Young, Re Kitchin* (1881), 17 Ch. D. 668.

(*p*) *Coles* v. *Pack* (1870), L. R. 5 C. P. 65, 70; *Wood* v. *Priestner* (1867), L. R. 2 Ex. 66, 282.

(*q*) (1843), 5 M. & G. 392.

of £100"; there was at the time when the guarantee was made an account existing between A. and B., though at the time the amount due in connection with it was less than £100:—*Held*, a guarantee of the existing account only. But in *Wood* v. *Priestner* (*r*), P. was indebted to W. for coals supplied on credit, and he desired to buy more; his father gave the following guarantee: "In consideration of the credit given by W. to my son for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of £100, and in default of his payment of any accounts due, I bind myself by this note to pay W. whatever may be owing, to an amount not exceeding £100":—*Held*, a continuing guarantee.

RIGHTS OF A SURETY.

In addition to the usual rights of a contracting party, such as right to relief on the ground of fraud, or on the ground that conditions agreed upon have not been observed, the peculiar position of the surety gives him special advantages. He is a favoured debtor.

In the first place, the intended surety is entitled to a fair opportunity of making inquiries as to facts which might influence him in deciding whether or not he will enter into the contract, and any fraudulent concealment or material wilful misrepresentation will avoid it; though, as a rule, there is no duty to make disclosures, there is a duty not to mislead an intending surety, and very little said which ought not to have been said, or very little omitted which ought to have been said, will

(*r*) (1867), L. R. 2 Ex. 66, 282.

avoid the contract (*s*). When a continuing guarantee has been given, the creditor must not conceal any facts which to his knowledge happen subsequently, and which would give the surety a right to avoid the contract (*t*).

The failure of the principal debtor to meet his engagement must not be brought about or facilitated by any act or default of the creditor ; but mere laches of the obligee or passive acquiescence in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties (*t*).

When he pays the debt he has the following rights :

1. *Against the Principal Debtor.*—To recover, with interest (*x*), from him all money properly paid when due (*y*) on account of the guarantee, provided, of course, that the debtor was a consenting party to the suretyship (*y*). Whether or not the costs of disputing the claim of the creditor can be recovered from the debtor, depends upon whether the expense of resistance to the claim was reasonably incurred ; and it is advisable to inform the principal debtor of intended payment of the

(*s*) *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469. Under special circumstances there may even be a duty to disclose all material facts (*Seaton* v. *Burnand*, [1899] 1 Q. B. 782 ; 4 Com. Cas. 193 ; reversed on the facts, [1900] A. C. 135 ; 5 Com. Cas. 198).

(*t*) See the judgment of DENMAN, J., in *Mayor of Durham* v. *Fowler* (1889), 22 Q. B. D. 394, 421.

(*x*) *Petre* v. *Duncombe* (1851), 20 L. J. Q. B. 242.

(*y*) *Exall* v. *Partridge* (1799), 8 T. R., at p. 310. The seizure and sale of the surety's property under execution for the debt will entitle the surety to sue the debtor (*Rodgers* v. *Maw* (1846), 15 M. & W. 444).

creditor's demand ; this enables such defence to be set up as the debtor thinks fit, and prevents difficulties which might otherwise arise when the surety demands his indemnity from the principal (*z*). The surety also is entitled to enforce against the debtor the rights which the creditor enjoyed in regard to the debt in question (*a*).

Moreover, a surety has the right *before* payment to compel the principal debtor to relieve him from liability by paying off the debt, if the debt is actually due and the surety admits liability. In such a case it is not necessary to prove that the creditor has refused to exercise his right to sue the principal debtor (*b*).

2. *Against the Principal Creditor.*—To be placed in the position of that creditor as to all judgments, securities given by the debtor, and other rights. If he is surety for part of the debt only, his rights to the securities also are but partial (*c*). These may be used as against the debtor or co-sureties equally, but so that the latter can only be compelled to pay thereunder the proportionate shares to which they are liable.

As regards securities, HALL, V.-C., in *Forbes* v. *Jackson* (*d*), said: "The surety is entitled to have all the

(*z*) *Duffield* v. *Scott* (1789), 3 T. R. 374.

(*a*) See below. He may have larger rights than the creditor had. See *Badeley* v. *Consolidated Bank* (1887), 34 Ch. D., at p. 556.

(*b*) *Ascherson* v. *Tredegar Dry Dock, etc. Co.*, [1909] 2 Ch. 401.

(*c*) *Goodwin* v. *Gray* (1874), 22 W. R. 312. This right of the surety does not take from the creditor the right to surrender his security on the debtor's bankruptcy and prove as provided by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*Rainbow* v. *Juggins* (1880), 5 Q. B. D. 138, 422.

(*d*) (1882), 19 Ch. D. 615, 621 ; *Duncan & Co.* v. *North and South Wales Bank* (1881), 6 App. Cas. 1.

securities preserved for him, which were taken at the time of the suretyship, or, as I think it is now settled, subsequently. . . . The principle is that the surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the duty of the creditor to keep the securities intact, not to give them up or to burthen them with further advances."

The creditor's priority, if he has any, passes also to the surety who pays the debt, *e.g.*, a surety who paid a debt due to the Crown was held entitled to the Crown's priority, so far as was necessary for his indemnity (*e*).

By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5, "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies (*f*), and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as

(*e*) *In re Lord Churchill* (1888), 39 Ch. D. 174.

(*f*) If the surety has not obtained an actual assignment of the judgment, he may still have the advantage of this section (*Re McMyn* (1886), 33 Ch. D. 575).

the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty ; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him : Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable " (*g*).

3. *Against Co-sureties.* — To contribution from them (*h*). If, owing to the default of a principal, the sureties (whether bound by the same or by different instruments) become liable, all must contribute equally if each is a surety to an equal amount, otherwise they must contribute in proportion to the amount for which each is a surety (*i*). And in counting the number of sureties for this purpose, those unable to pay are not reckoned (*i*). Thus, if A., B., and C. are sureties for £1,200, and A. pays the whole, he can claim £400 from B. and £400 from C., or, according to equitable rules, if C. be insolvent, A. can claim £600 from B. But a surety who has paid cannot claim from his co-surety unless he has paid more than his proportion of the debt remaining due at the time of such payment, even though the co-surety has so far paid nothing ; *e.g.*, S.

(*g*) He may sue or prove in bankruptcy for the total amount of the debt, but cannot actually get payment of more than his just proportion (*Re Parker*, [1894] 3 Ch. 400).

(*h*) *Dering* v. *Lord Winchelsea* (1787), 1 Cox, 318.

(*i*) *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75 ; 1 Com. Cas. 210.

and H. were co-sureties whose liability was limited to £1,000 and costs; upon default of the principal, H. paid the creditor a demanded sum of £541 2*s.* 1*d.*, being half the amount still due on the bond, and claimed as a creditor £270 11*s.* 0½*d.* from S.:—*Held*, he could not claim contribution (*k*). But if, when H. paid, the sum of £541 2*s.* 1*d.* had been the whole amount due, H. would have been able to get contribution from S. (*l*).

The surety may (it seems) insist upon payment to the creditor of the co-surety's proportion, although he has not yet himself actually paid the creditor (*m*), especially if judgment has been obtained against him (*n*).

A co-surety is entitled to a share of every counter security which has been delivered to any of the sureties, and such security must be brought into hotchpot in order that the ultimate burden may be equally divided (*o*).

DISCHARGE OF THE SURETY.

The surety is entitled to discharge on any of the grounds which suffice to put an end to contracts in general (*p*), and on the following, which are peculiar

(*k*) *Ex parte Snowdon* (1881), 17 Ch. D. 44; *Davies* v. *Humphries* (1840), 6 M. & W., at p. 168.

(*l*) *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B., at p. 80; 1 Com. Cas., at p. 212.

(*m*) *Per* JAMES, L.J., in *Ex parte Snowdon* (1881), 17 Ch. D., at p. 47.

(*n*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514. For this purpose an admitted claim in an administration action is equivalent to judgment (*ibid.*).

(*o*) *Steel* v. *Dixon* (1881), 17 Ch. D. 825. (*p*) See *ante*, p. 80.

to guarantees (*q*): (1) If the creditor has altered the terms of the contract guaranteed without the assent of the surety. "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration" (*r*).

In *Polak* v. *Everett* (*s*), QUAIN, J., said: "The contract of the surety should not be altered without his consent, and the creditor should not undertake to alter the contract, and then say, 'Although the contract has been altered, and I put it out of my power to carry it out by my voluntary act, I now offer you an equivalent.'" Giving time to the principal debtor will, except in certain cases, release the surety, provided that there is a binding contract with the debtor (*t*) (express or implied, written or verbal) to give time, and not merely a forbearance by the creditor to enforce his rights. Lord ELDON, in *Samuell* v. *Howarth* (*u*),

(*q*) The contract of suretyship may, however, contain special clauses excluding the ordinary rights of a surety. See, for example, *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. at p. 470.

(*r*) COTTON, L.J., in *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, at p. 505.

(*s*) (1876), 1 Q. B. D. 669, at p. 677.

(*t*) *Clarke* v. *Birley* (1889), 41 Ch. D. 422.

(*u*) (1817), 3 Mer. 272, 278.

said: "The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; *i.e.*, if time is given by virtue of a positive contract between the creditor and principal, not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal debtor or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract" (*x*). To this there is an important exception, since a surety is not released by an agreement to give time to the debtor, if the creditor reserves his rights against the surety. The reasons why the reservation by the creditor of his rights against the surety does not release the latter are that (i) it rebuts the implication that there was any intention to discharge the surety and (ii) the principal debtor, by consenting to this reservation impliedly agrees that the surety shall have recourse against him; so that in effect the rights of the surety are not impaired, and he may, notwithstanding the agreement, pay the creditor and enforce his rights against the debtor (*y*).

2. If the creditor takes a new security from the debtor in lieu of the original security or of such kind as to operate by way of merger of the old security (*z*).

(*x*) And see *Rees* v. *Barrington*, 2 W. & T. L. C. (7th ed.) 568.

(*y*) *Kearsley* v. *Cole* (1847), 16 M. & W. 128, at p. 135.

(*z*) *Boaler* v. *Mayor* (1865), 19 C. B. (N.S.) 76.

3. A further ground of discharge is the negligence of the creditor in his dealings with the debtor, or misuse of securities held by him for the debt, resulting in detriment to the surety, so that the remedies are affected. As regards negligence in dealings, the principle was thus stated by COTTON, L.J. (*a*): "If there is a contract express or implied that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, that discharges the surety . . . A surety is not discharged merely by the negligence of the creditor." For instance, A. lent money to B. and P. upon the security of certain goods and fixtures, and by the terms of the deed A. was entitled to enter on the happening of certain events. The deed required registration, but the creditor did not register, neither did he enter into possession when he became entitled to do so: consequently, B. and P. becoming bankrupt, the goods were lost, and the sureties were held discharged only to the extent of the value of the goods (*b*). But mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond will not relieve the sureties (*c*).

4. The absolute discharge of the principal is the discharge of the surety (*d*). But a covenant entered

(*a*) In *Carter* v. *White* (1884), 25 Ch. D., at p. 670.

(*b*) *Wulff and Another* v. *Jay* (1872), L. R. 7 Q. B. 756.

(*c*) *Mayor of Durham* v. *Fowler* (1889), 22 Q. B. D. 394, where all the cases are considered; and see *Black* v. *Ottoman Bank* (1862), 15 Moo. P. C. 472.

(*d*) *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C., at p. 316; *cf. Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464.

into between debtor and creditor that the latter will not sue the former, and with reservation against the surety, will not release the surety (*e*). And an agreement which purports to release the debtor, but which reserves rights against the sureties, will, in general, be construed as a covenant not to sue (*f*). The discharge of a surety on one agreement will not release another surety bound for the same debt by a separate agreement from his engagement, unless the effect of such discharge is to take away or to affect injuriously that other's right to contribution; though if that other surety became such on the faith of the liability of the one, or if the sureties are joint sureties, the discharge of the one acts as a release (*g*).

5. Death of a surety will, if the consideration be divisible, revoke a continuing guarantee, and his estate is not liable thereon for advances made subsequently to and with notice of the death (*h*); but on a joint and several continuing guarantee, the death of one surety does not *per se* release his co-sureties (*i*). Nor, if the consideration for the guarantee has been given once for all, will the death of the surety release his estate from future liability under the guarantee (*k*); and if any notice is required to revoke a continuing guarantee, mere knowledge of the surety's death is not sufficient to determine the liability (*l*).

(*e*) *Price* v. *Barker* (1855), 4 E. & B. 760.

(*f*) Lord HATHERLEY in *Green* v. *Wynn* (1869), L. R. 4 Ch., at pp. 204, 206.

(*g*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755.

(*h*) *Coulthart* v. *Clementson* (1880), 5 Q. B. D. 42.

(*i*) *Beckett* v. *Addyman* (1882), 9 Q. B. D. 783.

(*k*) *Lloyd's* v. *Harper* (1881), 16 Ch. D. 290.

(*l*) *In re Crace*, [1902] 1 Ch. 733.

6. If the undertaking to become surety be entered into on the faith that another shall also become a surety, and that other refuses to, or for any other reason does not, join in the guarantee, those who have already executed it are entitled to consider their liability at an end (*m*).

7. Whether a guarantee may be revoked by the surety depends upon circumstances, but speaking generally, it may be said that if the consideration for the guarantee has been given once for all, the guarantee is irrevocable save by mutual consent (*n*); if it be a continuing guarantee and the consideration is divisible, it may, as regards future transactions, be revoked by notice (*o*). Whether, in the absence of express stipulation, a guarantee given to secure the fidelity of a servant can be revoked, is open to question; it seems that in such a case the revocation cannot be immediate and probably a notice sufficient to enable the employment to be lawfully determined would at least be required (*p*).

8. By the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18, a continuing guarantee given to a firm or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm.

(*m*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755. See, for an example, *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; 1 Com. Cas. 210.

(*n*) *Lloyd's* v. *Harper* (1881), 16 Ch. D. 290.

(*o*) *Coulthart* v. *Clementson* (1880), 5 Q. B. D. 42.

(*p*) *In re Crace*, [1902] 1 Ch. 733

9. Neither the discharge in bankruptcy of the principal debtor, nor the acceptance of an arrangement by his creditors, will operate to discharge sureties for his debts (*q*).

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (4); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3.

PAWN, MORTGAGE, AND LIEN.

This section deals with rights more or less similar, but really distinct. In each case some person acquires rights over the property of another, not with the intention of retaining them, but of surrendering them, when certain liabilities are satisfied. At the same time, the distinction in the relationships produced in each case is well marked.

In a pledge, the possession of the property but not the ownership passes to the creditor ; a right to sell accrues to him in certain eventualities. In mortgage, the property in the thing mortgaged in conveyed to the mortgagee conditionally, the possession, until default, generally remaining in the original owner. In lien, the possession is with the creditor, the ownership with the debtor, but there is in most cases no right of sale (*a*).

Pawn.

This is a delivery of goods by a debtor to his creditor, as security for a debt. Its effect is to transfer possession and consequent rights, and therefore the pawnee can bring an action for the return of the goods if they are taken from him ; so also can the pledgor. There is also an implied undertaking on the part of the pawnee to return the article when the debt is paid at the stated date, or if no time is stated, then whenever the pawnor pays or makes proper tender, and

(*a*) See *Coggs* v. *Bernard* (1703), 1 Sm. L. C. (11th ed.), at p. 199.

the pawnor impliedly undertakes that it is his property (*b*). A man cannot ordinarily pledge property which does not belong to him ; but to this there are exceptions (*c*).

The pawnee must use ordinary diligence in his care of the pledge, but if, notwithstanding such diligence, it is lost, he incurs no liability. If then the pledge be stolen, the pawnee must show that it was not lost for want of what an ordinarily prudent man would have done to ensure its safety ; and if notwithstanding it was taken by robbery, he is not bound to replace it (*d*). He must not use goods pledged unless they are such as will not deteriorate by wear, and even in such a case he uses them at his peril (*e*).

He obtains a power of sale when default is made in payment of the debt at the stipulated time ; or if no time is stipulated, then after a proper demand for payment has been made, and a reasonable time for performance has been allowed (*f*). Any excess obtained by the sale beyond the amount necessary to liquidate the debt and expenses must be returned to the pawnor.

A pawnee usually loses his rights by parting with the possession of his pledge, but he may redeliver it to the pledgor for a limited purpose without losing such rights (*g*).

Pledges given to pawnbrokers, *i.e.*, to persons carrying on the business of taking goods and chattels in

(*b*) *Cheesman* v. *Exall* (1851), 6 Ex. 344.
(*c*) See *ante*, pp. 138—141. Factors Act, 1889.
(*d*) *Coggs* v. *Bernard* (1703), 1 Sm. L. C. (11th ed.) 173, at p. 185.
(*e*) *Ibid.*, p. 177.
(*f*) Story's Bailments, s. 309.
(*g*) *North Western Bank* v. *Poynter*, [1895] A. C. 56.

pawn (*h*), are subject to the provisions of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). Amongst these may be noted—(1) that the Act does not apply to loans of over £10 (*i*); (2) pawn-tickets must be given for the pledge (*k*); (3) every pledge is to be redeemable within twelve months and seven days (*l*); (4) pledges above ten shillings in value, not redeemed, are to be sold by auction, and those of ten shillings or under are to be forfeited (*m*); (5) pledges over ten shillings are redeemable till sale (*n*); (6) special contracts may be made on loans of above forty shillings, subject to giving a special pawn-ticket signed by the pawnbroker and a duplicate signed by the borrower (*o*). There are, in addition, many provisions, the objects of which are to ensure that the right person gets back the pledge upon payment, and to restrain the commission of crimes.

MORTGAGE OF PERSONAL PROPERTY.

In this place it is intended to restrict the remarks made on mortgages to such as affect personal property; information as to mortgages on real property should be sought in special works on that subject. Mortgages of personal property are in most instances within the Bills of Sale Acts (*p*). In cases in which these Acts do not apply, as, for instance, where shares are mortgaged, the mortgagee has an implied power to sell the shares on default by the mortgagor in payment

(*h*) 35 & 36 Vict. c. 93, s. 5.
(*i*) Section 10.
(*k*) Section 14.
(*l*) Section 16.
(*m*) Sections 17, 19.
(*n*) Section 18.
(*o*) Section 24.
(*p*) See *post*, pp. 461 *et seq.*

of the amount due at the time appointed. If no time for payment has been fixed, the mortgagee must give a reasonable notice to the mortgagor requiring payment on a day certain before he can sell (*q*). If the mortgage was by deed, the mortgagee would have the powers conferred by the Conveyancing Act of 1881 (*r*).

Bills of Sale.

These are regulated chiefly by the Bills of Sale Acts, 1878 and 1882. The object of the former Act is to prevent false credit being given to persons in apparent possession of goods which in reality belong to others: the object of the latter Act is to protect impecunious persons, who, it was believed, were often induced to sign complicated documents of charge which they did not understand. Accordingly, it will be found that the Act of 1878—which originally applied to all forms of bills of sale—makes void as against creditors and those representing them a secret disposition by bill of sale of chattels of which the grantor retains possession. On the other hand, the Act of 1882, which applies only to bills of sale given by way of security for money, totally invalidates such bills of sale if they are not in the prescribed form, and makes them of none effect even between the parties. Although, so far as bills of sale by way of security for money are concerned, the Act of 1878 is superseded by the Act of 1882, some of the provisions of the former Act are retained in the latter, and are therefore applicable to both classes of bills of

(*q*) *Dererges* v. *Sandeman, Clarke & Co.*, [1902] 1 Ch. 579.
(*r*) 44 & 45 Vict. c. 41, ss. 19, 20.

sale, *i.e.*, absolute or by way of security. For instance, the definition of bill of sale is the same for both Acts. The term "bill of sale" includes not only bills of sale strictly so called (*i.e.*, assignments of personal chattels giving a title without delivery), but also many other documents, viz., assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, licences to take possession of chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred (*s*). Also any attornment or agreement, except a mining lease, whereby a power of distress is given, or agreed to be given, by way of security for any debt or advance and which reserves rent as interest, is to be deemed a bill of sale so far as the distress is concerned, saving the rights of a mortgagee of lands already in possession who demises to his tenant at a fair rent (*t*). The relationship of landlord and tenant created by an attornment clause will not be affected for any other purpose (*u*).

But the term "bill of sale" is not to include assignments for the benefit of creditors (*x*), marriage settle-

(*s*) Section 4 of the Act of 1878.

(*t*) (1878), s. 6; *Ex parte Kennedy* (1888), 21 Q. B. D. 384.

(*u*) *Mumford* v. *Collier* (1890), 25 Q. B. D. 279.

(*x*) Though expressed to exclude creditors having notice of the deed who do not come in within a given time (*Hadley* v. *Beedom*, [1895] 1 Q. B. 646).

ments (*y*), transfers of ships or shares therein, transfers of goods in the ordinary course of trade, bills of lading, or any documents used in the course of trade or business as proof of the possession or control of or authorising the possessor to transfer or receive goods, assignments of fixtures, unless separately assigned, or debentures of incorporated companies (*z*).

Verbal contracts are not within the Acts, which strike at documents and not at transactions (*a*) ; nor is any document which is merely ancillary and which does not give the transferee his title ; hence, when property and possession pass under a verbal arrangement, a receipt for money payable in connection therewith given subsequently, will not be a bill of sale (*b*). When goods have already passed out of the possession of the transferor, documents subsequently executed evidencing the transaction are not bills of sale (*c*) ; for, as Cotton, L.J., said in *Marsden* v. *Meadows* (*d*), the documents to be within the Act must be "documents on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken.

(*y*) Including agreements to settle on marriage, even though informal and not under seal (*Wenman* v. *Lyon*, [1891] 2 Q. B. 192).

(*z*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627 ; *Clark* v. *Balm, Hill & Co.*, [1908] 1 K. B. 667 ; (1882), s. 17.

(*a*) *North Central Wagon Co.* v. *M. S. & L. Rail. Co.* (1887), 35 Ch. D. 191 ; *Newlove* v. *Shrewsbury* (1888), 21 Q. B. D. 41.

(*b*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18.

(*c*) *Charlesworth* v. *Mills*, [1892] A. C. 231.

(*d*) (1881), 7 Q. B. D. 80 ; and see *Ex parte Hubbard* (1886), 17 Q. B. D. 690, contrasting it with *Ex parte Parsons* (1886), 16 Q. B. D. 532 ; *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 13 App. Cas. 554.

to use an expression found in some of the cases, at the time as a record of the transaction."

In considering whether a document, apparently not within this definition, is nevertheless covered by it, the court not only may but must inquire into the *real* nature of the transaction. Thus, where the real agreement was one to lend money upon the security of goods in which the borrower had an interest, but took the form of a purchase of the goods by the lender, followed by a hire-purchase agreement with the borrower, the court held the latter agreement to be a bill of sale (*e*).

The Acts refer only to bills of sale of personal chattels, a term which will include fixtures and growing crops if assigned separately from the land to which they are attached; also trade machinery though attached to the land. But assignments of stocks, shares, contracts, and other choses in action are not assignments of personal chattels, and hence are not affected by these Acts (*f*).

Bills of sale are of two kinds: (i) *absolute*, such as pass the property absolutely to the transferee; (ii) *conditional*, such as pass it subject to a condition revesting it upon the performance of the condition, viz., upon the payment of money. The Act of 1882 is confined in its operation to conditional bills.

Requisites and Formalities.—With one exception the provisions for registration are the same for both Acts (*g*).

(*e*) *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 639; *Mellor* v. *Maas*, [1903] 1 K. B. 226, affirmed in the House of Lords, *sub nom.* *Maas* v. *Pepper*, [1905] A. C. 102.

(*f*) (1878), s. 4.

(*g*) (1878), ss. 8, 10; (1882), ss. 8, 10.

1. The bill must be registered within seven days after execution. To the registrar must be presented (i) the original bill, with every schedule or inventory annexed to or referred to in it (*h*) ; (ii) a true copy of such bill and schedules, and of every attestation of the execution of the bill of sale ; (iii) an affidavit verifying the execution and attestation, stating also the time of execution, and the names, addresses, and occupations of the grantor and of every attesting witness. The copy and affidavit must be filed within the seven days. It is not necessary for the grantor to specify every occupation in respect of which he is engaged or liable, it is sufficient to state his occupation in a concise way, and one in which he would be recognised by those acquainted with him and his pursuits (*i*). 2. The execution must be attested and the bill explained by a solicitor, though if the bill be conditional this is no longer required. In the latter case, any credible witness not a party to the bill will be sufficient (*k*). This is the exception above referred to. 3. The bill must contain a statement of the consideration and this must be substantially true ; of course, it must contain no misstatement, but more, it should state nothing inaccurately. It will be sufficient if the facts are accurately stated, either as to their legal or as to their mercantile and business effect. It would not be correct to describe money retained by the grantee as paid to the grantor, unless it was retained in respect

(*h*) A bill of sale contained an assignment of "1,800 books as per catalogue" ; and it was decided that the catalogue was not a schedule or inventory which required registration (*Davidson* v. *Carlton Bank*, [1893] 1 Q. B. 82).

(*i*) *Feast* v. *Robinson* (1894), 63 L. J. Ch. 321. See also *Kemble* v *Addison*, [1900] 1 Q. B. 430.

(*k*) (1882), s. 10.

of a *pre-existing* debt (*l*). Nor can money advanced contemporaneously with the execution of the deed be properly stated as "now owing." It does not become due until the future date specified in the bill, and should be described as "now paid" (*m*). 4. If made with a defeasance (*i.e.*, any agreement which may enable the bill to be avoided) or subject to any condition or declaration of trust, the defeasance, condition, or declaration of trust must be set forth on the same paper which contains the bill; and it must be contained in the registered copy (*n*). Thus where a promissory note was given at the same time, and for the same consideration as the bill, payable by instalments, and there was a proviso that if the instalments became in arrear the whole debt might be claimed at once, it was held that this constituted a defeasance, since by payment of the promissory note the bill of sale would be defeated, and not being contained on the same paper as the bill, the latter was void (*o*). It does not matter in whose favour the defeasance or condition operates (*p*).

If the above requisites are not complied with, the bill of sale, if an absolute bill, is void as regards all goods covered by it in the *apparent possession* of the grantor against the following: (1) Trustee in bankruptcy of the

(*l*) (1878), s. 8; (1882), s. 8. See *In re Charing Cross Bank* (1881), 16 Ch. D. 35; *Ex parte Rolph* (1882), 19 Ch. D. 98; *Ex parte Firth* (1882), 19 Ch. D. 419; *Richardson* v. *Harris* (1889), 22 Q. B. D. 268; *cf. Re Wiltshire*, [1900] 1 Q. B. 96.

(*m*) *Davies* v. *Jenkins*, [1900] 1 Q. B. 133.

(*n*) (1878), s. 10 (3).

(*o*) *Counsell* v. *London and Westminster Loan Co.* (1887), 19 Q. B. D. 512. The note would be good (*Monetary Advance Co.* v. *Cater* (1888), 20 Q. B. D. 785. See also *Edwards* v. *Marcus*, [1894] 1 Q. B. 587).

(*p*) *Edwards* v. *Marcus*, *supra*.

grantor ; (2) assignees for the benefit of his creditors ; (3) those seizing the goods comprised in the bill under executions ; (4) all persons on whose behalf the goods have been thus seized (*q*). To avoid these penalties "there must be something done which plainly takes [the goods] out of the apparent possession of the debtor in the eyes of everybody who sees them" (*r*). A conditional bill of sale which is not duly attested or registered or which does not truly set forth the consideration is void in respect of the personal chattels comprised therein (*s*).

A bill of sale, when registered, takes its priority over others according to the date of registration (*t*) ; no transfer need be registered (*t*) ; at the expiration of every five years re-registration is necessary (*u*).

Except where otherwise indicated. the above applies to all bills of sale. It is important here to notice a further provision which applies to absolute bills of sale only. If duly registered they are not within the order and disposition clause of the Bankruptcy Acts (*x*). The exemption does not apply to bills of sale given by way of security (*y*).

The Act of 1882.—It remains to consider the provisions of the Act of 1882, which applies to conditional bills of sale only. A bill of sale given by way of security for the payment of money, must be made in accordance with the form in the schedule to the Act

(*q*) (1878), s. 8.

(*r*) *Ex parte Jay* (1874), L. R. 9 Ch., at p. 704.

(*s*) (1882), s. 8. As to the effect of omitting a defeasance or condition from a conditional bill of sale, see *post*, p. 470.

(*t*) (1878), s. 11.

(*u*) (1878), s. 10.

(*x*) (1878), s. 20.

(*y*) (1882), s. 15.

under penalty of avoidance (*z*); *i.e.*, it must produce the precise legal effect—neither more nor less—of that form, it must preserve all the characteristics of the form, and it must be so framed as not to deceive any reasonable person as to its exact meaning (*a*). The form is as follows:

Form of the Bill of Sale.

"This indenture made the day of between A. B. of of the one part and C. D. of of the other part WITNESSETH that in consideration of the sum of £ now paid to A. B. by C. D. the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*] he the said A. B. doth hereby assign unto C. D. his executors administrators and assigns all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid together with the interest then due by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

"Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of

(*z*) (1882), s. 9.

(*a*) *Ex parte Stanford* (1886), 17 Q. B. D. 259; *Thomas* v. *Kelly* (1888), 13 App. Cas. 506. The fact that the transaction cannot be expressed in a document in the statutory form will be no excuse for diverging from it (*Ex parte Parsons* (1886), 16 Q. B. D. 532).

by the said C. D. for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

"In witness, etc.

"Signed and sealed by the said A. B. in the presence of me E. F. [*add witness's name, address, and description*]."

As showing the strictness with which the form must be followed reference may be had to the following cases in which a divergence was held fatal. Separate grants by separate grantors of chattels belonging to them separately are not within the form, which contemplates only one grant (*b*). Omission of the address of the grantee (*c*); it will be noticed that the form runs, A. B., of , C. D., of , thereby clearly indicating that the address of both must be given. A general assignment in the body of the deed of chattels to be afterwards acquired (*d*). These can only be assigned in two cases: (i) where brought on in substitution for such fixtures, plant, and trade machinery as are by definition "personal chattels," and are already described in the schedule to the bill of sale (*e*); (ii) where assigned for the purpose of maintaining the security—*e.g.*, a covenant to replace such articles (specifically described in the schedule) as may be damaged or worn out, with others of equal value (*f*). The inclusion of anything not a "personal chattel" will be an offence against the statutory form (*g*), but though

(*b*) *Saunders* v. *White*, [1902] 1 K. B. 472.

(*c*) *Altree* v. *Altree*, [1898] 2 Q. B. 267.

(*d*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.

(*e*) (1882), s. 6 (2).

(*f*) *Seed* v. *Bradley*, [1894] 1 Q. B. 319; *Consolidated Credit Corporation* v. *Gosney* (1886), 16 Q. B. D. 24.

(*g*) *Cochrane* v. *Entwistle* (1890), 25 Q. B. D. 116.

void as a bill of sale, the deed would in such cases be good as to anything assigned which was not a personal chattel (*h*) ; a conveyance of property by the grantor "as beneficial owner," which has the effect of introducing into the statutory form covenants not contained in it (*i*) ; a proviso enabling the grantee to retain the bill of sale after payment of the secured debt (*k*) ; a proviso enabling the grantee to have the goods valued, and to purchase them himself at the valuation, and to receive the moneys to arise from such valuation (*l*) ; a proviso that the grantor would not obtain credit to the extent of £10 from any persons save the grantees, that he would give the grantees the greater portion of his business, that he would keep proper books of account, and permit any of the grantees to inspect the same (*m*). Whenever part of the consideration is a present advance, it is essential to the validity of the bill that it should contain an acknowledgment of the receipt of that advance (*n*). A bill of sale, though on the face of it unobjectionable, is not in accordance with the form if it omits a condition or defeasance which ought to have been inserted in the bill of sale and which, if inserted, would have rendered it void (*o*).

On the other hand, a covenant for unequal repayment is permissible. It is true that the form runs "by equal payments," but a qualification is introduced by

(*h*) *In re Burdett* (1888), 20 Q. B. D. 310.
(*i*) *Ex parte Stanford* (1886), 17 Q. B. D. 259. See Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7 (c).
(*k*) *Watson* v. *Strickland* (1887), 19 Q. B. D. 391.
(*l*) *Lyon* v. *Morris* (1887), 19 Q. B. D. 139.
(*m*) *Peace* v. *Brooks*, [1895] 2 Q. B. 451.
(*n*) *Davies* v. *Jenkins*, [1900] 1 Q. B. 133.
(*o*) *Smith* v. *Whiteman*, [1909] 2 K. B. 437.

the words in brackets "[or whatever else may be the stipulated time or times of payment]." This clearly allows a payment by one instalment, and thereby shows that payment by equal instalments is not the only mode contemplated by the form (*p*); so also a clause in a bill which provides for payment by equal instalments which include both principal and interest is permitted by the statutory form (*q*). The form requires the witness's name, address, and description. Description by occupation would be sufficient, but if the witness has no occupation his style must be given (*r*).

The consideration must amount at least to £30 (*s*). It must be noticed that there are three kinds of penalties provided by the Act of 1882. If the bill is not in the prescribed form, or if the consideration does not amount to £30, it is absolutely void even as between the parties (*t*), and the grantee is entitled merely to the return of his money with 5 per cent. interest and without the security of the bill (*u*). In the event of improper registration or attestation, or if the consideration is not truly stated, the bill is void even as between the parties, but only so far as it gives security over the chattels (*x*); an agreement in the bill to pay a given

(*p*) *In re Clearer* (1887), 18 Q. B. D. 489; and see *Simmons* v. *Woodward*, [1892] A. C. 100.

(*q*) *Linfoot* v. *Pockett*, [1895] 2 Ch. 835; *Rosefield* v. *Provincial Union Bank*, [1910] 2 K. B. 781.

(*r*) *Sims* v. *Trollope*, [1897] 1 Q. B. 24. *Cf.* the provisions of (1878), s. 10 (2), as to the description of the witness necessary in the affidavit filed on registration. Under that sub-section if the witness had no occupation it would not be necessary to give his style (*Ex parte Young. Re Symonds* (1880), 42 L. T. 744).

(*s*) (1882), s. 12.

(*t*) (1882), ss. 9, 12.

(*u*) *Davies* v. *Rees* (1886), 17 Q. B. D. 408.

(*x*) (1882), s. 8.

rate of interest would be enforceable. Thirdly, the bill of sale must have a schedule annexed containing an inventory of the personal chattels comprised in the bill, or the bill will be void except against the grantor (i) in respect of chattels which are not "specifically described" in the inventory in the schedule (*y*); or (ii) in respect of any chattels included in the schedule of which the grantor was not the true owner at the time of executing the bill of sale (*z*).

In s. 7 of the Act of 1882 the causes for which the goods covered by a bill of sale given to secure payment of money may be seized are set forth. These are: (1) If the grantor shall make default in payment (*a*) of the sum or sums of money secured by the bill at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security; (2) If the grantor shall become a bankrupt or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes; (3) If the grantor shall fraudulently either remove, or suffer the said goods, or any of them, to be removed from the premises; (4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes; (5) If execution shall have

(*y*) (1882), s. 4. "Specifically described" has been defined to mean described with such particularity as would be used in an ordinary business inventory of the chattels in question (*Witt* v. *Banner* (1888), 20 Q. B. D. 114; *Davidson* v. *Carlton Bank*, [1893] 1 Q. B. 82; and see *Davies* v. *Jenkins*, [1900] 1 Q. B. 133).

(*z*) (1882), s. 5 (*Thomas* v. *Kelly* (1888), 13 App. Cas. 506). But as a grantor of goods under a bill of sale remains true owner of the equity of redemption of the goods up to seizure, he may give a second bill of sale, subject to the former (*Thomas* v. *Searles*, [1891] 2 Q. B. 408).

(*a*) Though of a single instalment (*Re Wood*, [1894] 1 Q. B. 605).

been levied against the goods of the grantor under any judgment at law. But the grantor may within five days from the seizure or taking possession of any chattels for any of the above-mentioned causes, apply to a judge of the High Court, and the judge may, if he is satisfied that the cause of seizure no longer exists, restrain the removal or sale of the chattels, or may make such other order as may seem just (*aa*). During the five days the goods may not be removed from the place of seizure (*b*).

Mention must be made of O. 57, r. 12 of the Rules of the Supreme Court, which provides that "when goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just." Similar provisions are contained in O. 27, r. 13 of the County Court Rules, 1903—1908. A sale will be ordered under this rule, when there will clearly be a surplus after paying off the bill of sale holder; will not be ordered when there will be clearly no surplus; and will not be ordered where it is doubtful whether there will be a surplus, unless the execution creditor will guarantee the bill of sale holder against loss by the sale (*c*).

(*aa*) (1882), s. 7. (*b*) *Ibid.*, s. 13.
(*c*) *Stern* v. *Tegner*, [1898] 1 Q. B. 37.

LIEN.

Liens are of various kinds—possessory, maritime, equitable.

(a) Possessory Liens.

A possessory lien is one which appertains to a person who has possession of goods which belong to another, entitling him to retain them until the debt due to him has been paid. They are of two kinds :

1. *Particular Lien.*—This is a right to retain the particular goods in connection with which the debt arose ; *e.g.*, a carrier may retain goods given to him for carriage until payment of his charges for carriage ; an innkeeper may retain his guest's goods. A particular lien may arise out of express agreement or by implication ; and the law will give an implied lien over goods which a person is compelled to receive ; *e.g.*, to an innkeeper over a guest's goods brought to the inn. And when the debt has been incurred for labour or skill exercised upon a particular thing, the creditor has an implied lien upon that thing for his reward (*d*) ; *e.g.*, a shipwright has a lien on a vessel for the cost of repairs. Amongst other cases of particular lien may be mentioned the lien of a carrier and the lien on cargo of the shipowner for freight (*e*).

2. *General Lien* may arise from custom (long existing, notorious, and reasonable) or contract ; and it is a right of retaining goods not only for the debt incurred in connection with them, but for the general balance owing by their owner to the person exercising the right of lien. Amongst trades or professions which

(*d*) *Ex parte Ockenden* (1754), 1 Atk. 235.
(*e*) *Ante*, pp. 415, 423, 437.

have this lien may be mentioned factors (*f*), bankers (*g*), stockbrokers (*h*), solicitors (*i*), and sometimes insurance brokers (*k*).

A possessory lien (as a rule) gives no right to sale (*l*), nor in fact any right, except such as belongs to a possessor merely, as distinguished from an owner. It is lost by payment and by surrender of possession (*m*); taking security may show an intention to abandon the lien (*n*).

(b) Maritime Liens.

A maritime lien is one which attaches to a thing in connection with some liability incurred in relation to a maritime adventure. It does not depend on the possession of the thing, but travels with it into whosoever's hands the thing may come. It is enforced by arrest and sale (unless security be given) through the medium of the Admiralty Court (*o*).

Amongst maritime liens may be named:

(1) The lien of a salvor; (2) the lien of the seamen for their wages; (3) the lien of the master for wages and disbursements; (4) the lien over a colliding ship and freight of one whose property has been damaged by collision with a ship brought about by the default of

(*f*) *Cowell* v. *Simpson* (1810), 16 Ves., at p. 280.

(*g*) See *ante*, p. 155.

(*h*) *In re London and Globe Finance Corporation*, [1902] 2 Ch. 416.

(*i*) *Ex parte Sterling* (1810), 16 Ves. 258. (*k*) See *ante*, p. 154.

(*l*) *White* v. *Spettigue* (1845), 13 M. & W., at p. 607. This is not always the case; *e.g.*, the vendor's lien often gives a right to sell (see *ante*, p. 277). Statutory power of sale is frequently possessed; thus an innkeeper may under certain circumstances sell his guest's goods (41 & 42 Vict. c. 38); a warehouseman or wharfinger may in certain events sell goods placed in his custody (57 & 58 Vict. c. 60, s. 497).

(*m*) *Kruger* v. *Wilcox* (1755), Amb., at p. 254.

(*n*) *Cowell* v. *Simpson*, *supra*: *Re Taylor*, *Stileman and Underwood*, [1891] 1 Ch. 590.

(*o*) See *The Bold Buccleugh* (1851), 7 Moo. P. C. 267, 284.

that ship ; (5) the lien of a bottomry bondholder. The order in which these liens are enforceable is mentioned below ; as a rule, they are enforced in an order inverse to that in which they attach to the *res*, *i.e.*, the last lien in point of time ranks first for payment. "The sole reason for this is that the later benefit preserves the *res* to satisfy the earlier claims and earns thereby a superior equity in respect of the common fund" (*p*). In accordance with this rule, seamen's wages usually come first, as they are not earned in full until the end of the voyage, but they would be postponed to liens for subsequent salvage or damages for collision, at any rate to the extent of wages earned before the collision. A bottomry bond ranks next to wages, but will be postponed to subsequent salvage, etc. The last bond takes precedence of former bonds.

A maritime lien may come into conflict with a possessory lien. Thus, the possessory lien of a shipwright for the cost of repairs is subject to maritime liens which attached to the ship before it was taken into his yard ; but the shipwright's possessory lien takes precedence of all maritime liens accruing after the commencement of his possession (*q*).

(c) Equitable Liens.

An equitable lien is nothing but the right to have a specific portion of property allocated to the payment of specific liabilities. The right of a partner on dissolution to have the firm's assets applied in payment of the firm's liabilities is a right of the class styled "equitable liens."

(*p*) Kay on Shipmasters, s. 80. (*q*) *The Tergeste*, [1903] P. 26.

SHIPPING.

It is impossible in the space at command here to do more than give the merest outline of this important topic ; it is proposed to state very shortly the law relating to (i) registration of British ships ; (ii) acquisition of ownership ; (iii) the position of owners ; (iv) the position of the master ; (v) salvage ; and (vi) the position of the seamen.

(i) Registration of a British Ship.

A British ship is one which is owned wholly by those entitled by law to hold a British ship. These are (*a*) : 1. Natural-born British subjects, who have never taken an oath of allegiance to, or become subjects of, a foreign government ; or who, if they have so done, have taken a subsequent oath to the English sovereign and whilst owners remain resident in the King's dominions, or are partners in a firm actually carrying on business in the King's dominions. 2. Naturalised persons, or denizens by letters of denization, and who have taken the oath subsequent to naturalisation, and are resident as above. 3. Bodies corporate, established under, and subject to the laws of, and having their principal place of business in the United Kingdom, or some British possession.

(*a*) 57 & 58 Vict. c. 60, s. 1. This Act is the Merchant Shipping Act, 1894, and is referred to in this chapter whenever a section is quoted without mention of the Act from which it is taken.

With certain exceptions, every British ship must be registered or she will not be recognised as such (*b*). Before registration these requisites must be satisfied; the name of the ship (*c*) must be marked as prescribed on the bows, and her name and the name of her port of registry on the stern; the official number and tonnage must be cut on her main beam, and a scale of feet denoting the draught in Roman letters or figures must be painted on the stem and stern post (*d*). Before registry, the ship must be surveyed and measured and the *certificate of survey* must be produced, giving the tonnage and build of the vessel, and generally identifying her (*e*); also on the occasion of the first registry, a *builder's certificate*, giving particulars as to the build and tonnage of the ship, and of the sale of the vessel to the person desiring to be registered as owner (*f*). The owner must then make a declaration, stating his qualification to hold a British ship; the number of shares he holds in the ship; a denial that, as far as he knows, any unqualified person is entitled to any interest in her; and the name of the master, and the time and place of build (*g*). A body corporate makes this declaration through its secretary or other proper officer.

Application for registration should be made by those requiring to be registered as owners or some of them,

(*b*) Section 2.

(*c*) The Board of Trade may refuse to register any ship by a name already belonging to a registered British ship or so similar as to be calculated to deceive (Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 50). Change of name requires the previous written consent of the Board of Trade (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 47).

(*d*) Section 7.

(*e*) Section 6.

(*f*) Section 10.

(*g*) Section 9.

or by their duly authorised agent appointed by individuals in writing, or by a corporation, under seal (*h*); and the registration is then performed by the principal officer of customs of the port, if it be in the United Kingdom, or by certain specified officers if it be in the colonies (*i*). An entry of the above particulars is made in the *register book* (*k*), and a *certificate of registry* (*l*) is given, which must contain details similar to those required in the certificates supplied by the owner. The certificate may, if lost, be renewed on following out the procedure prescribed by the Act (*m*); and it may not be detained for any lien or other such purpose—it is for use in navigation only (*n*).

If the ownership changes hands, an indorsement to this effect must be placed on the certificate at the port of registry if the vessel is there; if not, on her first arrival there, or the indorsement may be made at another port if the registrar at the port of registry advises the registrar of the latter port (*o*). If a ship is lost, or ceases to be a British ship, the certificate of registry must be given up (*p*).

Property in a British Ship (*q*).—The property in a British ship is divided into sixty-four shares, and no more than sixty-four persons may be registered at the same time as owners of one ship. But any share may be held in joint ownership, and the joint owners, not

(*h*) Section 8.
(*i*) Section 4.
(*k*) Section 11.
(*l*) Section 14.
(*m*) Section 18.
(*n*) Section 15.
(*o*) Section 20.
(*p*) Section 21. Section 52 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), contains provisions for the protection of mortgagees of ships sold to foreigners.
(*q*) Section 5.

exceeding five in number, may be registered and shall be considered as constituting one person, and any number of persons may have a beneficial title in a single share, the registering owner representing them ; a company or corporation may be registered by its corporate name. No person may be registered as owner of a fraction of a share.

(ii) ACQUISITION OF OWNERSHIP OF A BRITISH SHIP.

I. *Sale* will pass the ship or any share in her if the professing owner is in a position to give a good title, and if the proper formalities are observed. The method of passing the property is by bill of sale, which must be in the form set forth in the Act of 1894, must be executed before and attested by one or more witnesses, and must contain an identifying description, generally the same as is contained in the surveyor's certificate (*r*). The transferee must make a declaration (called a "declaration of transfer") stating that he (or his corporation, if he be an officer of a corporation) is in a position to hold a British ship, and that to the best of his knowledge and belief no unqualified person has any interest, legal or beneficial, in the ship, or in any share of her (*s*). The bill of sale, and the declaration are then produced to the registrar, and the transaction is recorded in the register book, and a statement of the entry indorsed upon the bill of sale itself (*t*).

(*r*) Section 24. The Bills of Sale Acts do not apply. See *ante*, pp. 462, 463.

(*s*) Section 25.

(*t*) Section 26.

II. *Transmission by Operation of Law.* — Ownership in a British ship or of shares in her may be transmitted by death to the executor or administrator of a deceased owner, or on bankruptcy to the owner's trustee in bankruptcy. In every case the person to whom the share is transmitted must be one capable of owning a British ship, and he must make and sign a declaration (called a "declaration of transmission") identifying the ship, with the requisite particulars, and stating the mode of transmission, and must produce the proper documentary proof of his right to represent the former owner; whereupon the registrar will make the requisite entries in the register book (*u*). If the transmission is to one not qualified to be the holder of a British ship, there is power to hold a sale at such person's request within four weeks of the transmission; the money is paid to such person as the court may direct. The time for making this application may be extended to one year, but if not made within the time limited, the ship or share is subject to forfeiture (*x*).

III. *Mortgage.*—A registered ship, or any share therein, may be mortgaged in two ways: (1) by a direct mortgage with registration; (2) by a mortgage under a mortgage certificate (*y*).

A direct mortgage must be in the form prescribed, and must, upon the production of the necessary instruments, be recorded by the registrar (*z*). Upon the order in the register book will depend the priority of mortgages *inter se* (*a*).

(*u*) Section 27.
(*x*) Section 28.
(*y*) See below.
(*z*) Section 31.
(*a*) Section 33.

It must be noted that the mortgage will not transfer the ownership of the vessel (*b*), but, subject to the rights of prior mortgagees, it confers a power of sale (*c*) on non-payment of the debt.

When a mortgage is discharged, the mortgage deed with a receipt for the mortgage money, indorsed, duly signed, and attested, should be produced to the registrar, and an entry recording the matter must be made by him in his book (*d*). Any transfer of the mortgage must also be in a prescribed form and recorded by the registrar (*e*). The court has inherent jurisdiction to expunge the entry of an invalid mortgage from the register (*f*).

IV. *Certificates of Sale and Mortgage.*—Difficulties might arise in selling or mortgaging ships which, at the time, are out of the country or colony where the port of registry is situated. To obviate these, the Act in such cases gives power to registrars to give *certificates of sale or mortgage* enabling certain persons to sell or mortgage the ship wherever she may be, but in accordance with the conditions of the certificate. The owner must give particulars to the registrar as to : (i) who is to exercise the power ; (ii) the minimum price of sale, if a minimum is to be fixed, or the maximum amount to be raised on the ship, if a maximum is intended to be fixed ; (iii) the place where the power is intended to be exercised or a declaration that it is intended to be exercised anywhere ; (iv) the time within which it is to be exercised. These particulars are to be entered

(*b*) Section 34.
(*c*) Section 35.
(*d*) Section 32.
(*e*) Section 37.
(*f*) *Brond* v. *Broomhall*, [1906] 1 K. B. 571.

into the registrar's book (*g*). The power is not to be used in the United Kingdom, nor in any British possession, if the port of registry is situated within it (*h*). The certificate must give the particulars from the register book relating to the vessel, and must enumerate any registered mortgages or certificates of sale or mortgage affecting the ship (*i*). Rules are laid down to be observed with respect to certificates of sale amongst which is this, that no certificate can be granted except for the sale of an entire ship. Certificates of mortgage may be given to allow of the mortgage of a share in a vessel (*k*). When a ship is mortgaged in accordance with the powers given in the certificate the mortgage must be registered by indorsement on the certificate of mortgage by a British consular officer. In the case of sale, the certificate and the bill of sale must be produced to the registrar of the port where the sale takes place, as also the certificate of original registry ; the certificates of sale and registry are then forwarded to the original port of registry, the registration of which closes the original registry, except so far as relates to unsatisfied mortgages or certificates of mortgages entered therein, and these will be entered also in the new registry to be opened at the port of transfer. A certificate not used must be re-delivered to the registrar by whom it was granted (*k*). The registered owner may cause the registrar to give notice of revocation to the registrar of the port where the power of sale or mortgage is to be exercised, and after such notice has been recorded the certificate will then

(*g*) Section 40.
(*h*) Section 41.
(*i*) Section 42.
(*k*) Sections 43, 44.

be revoked, save in so far as transactions under it have already taken place (*m*).

Taking Possession.—A mortgagee is entitled to possession if money becomes due under the mortgage, or the mortgagor is doing something to impair the security (*n*) ; and on taking possession he becomes entitled to the accruing freight (*o*), but not to unpaid freight which became due before he took possession (*p*).

Equitable Interests.—No notice of any trust, express, implied, or constructive, can be entered on the register book, and subject to any limitations appearing on the register book itself, the registered owner of a ship or a share in her has absolute power to dispose of his ship or share ; but, subject to this, beneficial interests (including those arising under contracts and other equitable interests) may be enforced by and against owners or mortgagees of ships just as they could against owners of any other personal property (*q*). Thus in *Black* v. *Williams* (*r*), the holders of floating debentures giving an equitable charge on certain steamships were postponed to persons having a subsequent registered legal mortgage on the same ships, though the latter had notice of the debentures when they took the mortgages ; but though the trust for the debenture holders could not be recognised as against the registered mortgagees, it remained valid and enforceable for other purposes.

(*m*) Section 46.

(*n*) *Law Guarantee and Trust Society* v. *Russian Bank*, [1905] 1 K. B. 815 ; *The Manor*, [1907] P. 339.

(*o*) *Keith* v. *Burrows* (1877), 2 App. Cas. 636.

(*p*) *Shillito* v. *Biggart*, [1903] 1 K. B. 683.

(*q*) Sections 56, 57.

(*r*) [1895] 1 Ch. 408.

An unqualified person cannot hold a share in a British ship, even as a beneficial owner (*s*).

Ship's Papers.—A ship must carry the proper papers, and is bound to show them to (*inter alia*) any naval commissioned officer of any of his Majesty's ships, officer of the Board of Trade, chief officer of Customs, mercantile marine office superintendent, British consular officer, or registrar-general of seamen (*t*).

Those usually carried are: (1) the certificate of registry; (2) the agreement with the seamen; (3) the charter-party and the bills of lading; (4) the bill of health; (5) invoices containing the particulars of the cargo; (6) the official log book. The entries in the log book must be signed by the master, and by the mate, or by some other of the crew, and in certain cases other signatures are required (*u*).

(iii) Position of Owners.

The possession of the ship is primâ facie evidence of ownership (*x*), so also is the certificate of registry (*y*). The owner's principal duty is to see that the vessel is seaworthy at the start, and to ensure, so far as is possible, that she will remain so (*z*), and if he becomes acquainted with any damage tending to render the vessel unsafe after the commencement of the voyage, there is a duty thrown upon him to repair it (*a*). He

(*s*) Sections 1, 25, 57.
(*t*) Section 723.
(*u*) Section 239.
(*x*) *Robertson* v. *French* (1803), 4 East, 130.
(*y*) Section 695.
(*z*) Section 458.
(*a*) *Worms* v. *Storey* (1856), 11 Ex. 427.

must appoint a proper master and crew, with a view to the general safety; therefore, a contract to sell a vessel, one condition being the appointment of a particular person as master, was held illegal (*b*). His liability at common law and under the Merchant Shipping Acts for the safety of all goods delivered to him to be carried has been mentioned, *ante*, p. 409. The registered owners are primâ facie liable to pay for all repairs and necessaries, the term "necessaries" including anchors, cables, coals, and indeed "all that is fit and proper for the service in which the ship is engaged, and that the owner, as a prudent man, would have ordered if present" (*c*). But the evidence is primâ facie only, for ownership does not *per se* carry with it the liability to pay for repairs, etc. If the owner gave the orders himself, or expressly or impliedly authorised another to do it for him, he is liable to pay the cost of the fulfilment of these orders; a master usually has such authority, but not "where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required" (*d*).

Co-owners are not of necessity partners (*e*), but in many cases are tenants in common, and it depends upon all the circumstances taken together, whether they are the one or the other. If merely tenants in

(*b*) *Card* v. *Hope* (1824), 2 B. & C. 661.

(*c*) Maude and Pollock (4th ed.), 99; *The Riga* (1872), L. R. 3 Ad. & Ec. 516.

(*d*) Lord ABINGER, in *Arthur* v. *Barton* (1840), 6 M. & W., at p. 143; and see *Gunn* v. *Roberts* (1874), L. R. 9 C. P. 331.

(*e*) The name and address of the person to whom the management is entrusted must be registered (s. 59).

common, each may transfer his share without consulting the others. They are not, in the absence of contract, agents for one another, nor do they bind each other by admissions. Frequently one owner is appointed by the others, or by some of them, to manage the employment of the ship and to do what is necessary in order to make her a profitable speculation (*f*) ; such an owner, termed a *managing owner* (*g*), can bind such of his co-owners as have given him authority, express or implied, to do so (*h*), and he has implied authority to do what is necessary in ordinary course to carry out on shore all that concerns the employment of the ship (*f*). He may make charter-parties ; he may not cancel them (*i*) ; he may employ a shipbroker and make the consequent payments (*k*). If an owner is liable to a creditor for work done to the ship, he may be made to pay the whole, and must rely for contribution on any right he may have against his co-owners.

Disputes frequently arise between co-owners as to the destination and details of an intended voyage. These are settled in the Admiralty Division of the High Court, which has jurisdiction in disputes concerning possession, earnings, etc. If the majority of owners desire to send the vessel on a particular voyage, but this is objected to by the minority, the court will, at the instance of the latter, arrest the vessel till the

(*f*) *The Huntsman*, [1894] P. 214.

(*g*) If the manager is not a co-owner, he is styled the "*ship's husband*."

(*h*) *Hibbs* v. *Ross* (1866), L. R. 1 Q. B. 534 ; *Frazer* v. *Cuthbertson* (1880), 6 Q. B. D., at p. 97.

(*i*) *Thomas* v. *Lewis* (1879), 4 Ex. D. 18.

(*k*) *Williamson* v. *Hine*, [1891] 1 Ch. 390.

majority have entered into a bond to an amount equivalent to the value of the shares held by the minority, to return the vessel safe, and to answer judgment in an action (*l*). The dissentient who thus gets security for his share has no claim to any freight earned on the voyage in question, nor is he liable for any of the expenses (*m*).

Each owner must contribute his share of capital for the expenses of outfit, and he must pay his quota towards the expense of repair ; further, he is liable for the expenses of management incurred by the ship's husband, if there be one appointed.

(iv) POSITION OF THE MASTER.

The Master.—The master (who must be duly certificated) must start on the voyage in time, and must take care to have a proper crew and equipment. He should manage the vessel, and navigate her in the agreed-upon manner, employing a pilot, where such is the custom of the port. He must keep an official log, and this, with the ship's papers, he must guard and show to the proper officer when required to do so. He is, of course, answerable for any fraudulent or illegal conduct of which he is guilty affecting the owner's interest, such conduct being, in his case, styled *barratry*. He has the same rights as a seaman, including a maritime lien, for the recovery of his wages, and for such disbursements or liabilities as he may properly make or incur on account of the ship (*n*).

(*l*) *In re Blanshard* (1822), 2 B. & C., at p. 248.

(*m*) *The Vindobala* (1888), 13 P. D. 42 ; 14 P. D. 50 ; *The England* (1887), 12 P. D. 32.

(*n*) Section 167 ; *The Castlegate*, [1893] A. C. 38 ; *The Orienta*, [1895] P. 49 ; and *cf. The Ripon City*, [1897] P. 226.

He must take the cargo as quickly as possible, must store it properly, and must sign the bill of lading for all he has taken on board (*o*). He should deliver the cargo, on arrival at the destination, to the proper person, subject to his lien for freight (*p*).

Among his powers are: (1) hypothecation, to raise money for necessary purposes (*q*); (2) sale, where this course is necessary, and the best course, and communication with the owner in time is impossible; (3) transhipment, in cases where it is desirable in the interest of his owners; (4) disciplinary powers over those on board the vessel; (5) jettison, *i.e.*, throwing goods overboard to lighten the ship; (6) in the absence of the owners, and if communication is impossible in time, he may bind them by contracts for the supply of necessaries, or may borrow money on their credit to pay for necessaries to be supplied, but not for those already supplied.

Bottomry.—When it is desired to raise money upon the ship, or upon ship and cargo, or upon ship and freight, a written instrument (sometimes sealed) is executed by the master binding him to repay the money within a limited time of arrival safe at home, and in the meantime assigning the ship and freight, and sometimes the cargo, as security. This instrument is called a *bottomry bond*. No particular form is required; it must contain the main terms of the contract (*r*).

It is an essential characteristic of the contract that the repayment of the money advanced should be

(*o*) See *ante*, pp. 429—432.

(*p*) *Ante*, p. 437. (*q*) See below.

(*r*) *The Mary Ann* (1866), L. R. 1 Ad. & Ec. 14; Maude and Pollock (4th ed.), pp. 569, 562, where a form of the bond is set out.

dependent upon the safe arrival at the ship's port of destination, and a deed making the loan repayable in any event would not be a good bond (*s*); but there seems to be no objection to a collateral agreement by the owner making himself personally liable (*t*). Interest will be payable as agreed.

The effect of the bond is to give the bondholder a claim upon the vessel, which he may enforce by a suit *in rem* in the Admiralty Division of the High Court. The bottomry bondholder's claim is preferential to that of a mortgagee, and is postponed to a claim on account of wages or of subsequent salvage (*u*); but a master who has bound himself on the bond, cannot set up his claim for wages in priority to the bondholder (*x*). Bondholders *inter se* do not rank in order of priority; on the contrary, the holder of the last given bond ranks first, and so on upwards (*u*).

The hypothecation may be made by the owner if he is on the spot, and under the following circumstances by the master, viz., when it is a matter of necessity to raise the money on the security of the vessel; for "necessity is the very foundation of this right" (*y*). And before pledging the ship, the master must do his best to raise money upon credit, and though previous communication with the owners is not a *sine quâ non*, yet it is necessary where possible (*z*). Whether or not

(*s*) *Per* TENTERDEN, C.J., in *Simonds* v. *Hodgson* (1835), 3 B. & Ad. 56; *The Haabet*, [1899] P. 295.

(*t*) *Willis* v. *Palmer* (1860), 7 C. B. (N.S.), at pp. 360, 361.

(*u*) See Maude and Pollock, pp. 575, 576.

(*x*) *The Jonathan Goodhue* (1859), Swa. 524. This rule does not apply where payment of the master will not prejudice the bondholder (*The Edward Oliver* (1866), L. R. 1 A. & E. 379).

(*y*) See Maude and Pollock (4th ed.), p. 564.

(*z*) See *The Karnak* (1869), L. R. 2 P. C. 505.

such necessity exists as to warrant the raising of money by hypothecation is a matter upon which the lender is bound to make inquiries, but "all that the lender of bottomry has to look to is—that the ship is in distress; that the master has no credit; that the amount is required for necessary purposes (*a*). And the bond must be given for money advanced for the ship, *e.g.*, not for a personal debt of the master, nor for matters outside the scope of his authority; and there must be, at the time, an intention to raise the money on bottomry: *i.e.*, a transaction not intended to be a bottomry bond cannot be made such thereafter (*b*).

The cargo may be hypothecated either for its own direct benefit, or for the benefit of the vessel generally, provided that the cargo receives some appreciable benefit or prospect of benefit from the transaction (*c*), but the master becomes only agent to bind the cargo-owner if an overruling necessity arises during the voyage (*d*). The master must, if possible, communicate, or at least try to communicate, with the cargo owners before hypothecating their property (*e*). The owner of the cargo is entitled to indemnity from the shipowner in the event of seizure under the bond (*f*).

When the cargo alone is hypothecated, the bond given is properly termed a *respondentia* bond, but the term bottomry bond is often also used in this sense.

(*a*) *The Mary Ann* (1866), L. R. 1 A. & E. 14.
(*b*) See *The Karnak* (1868), L. R. 2 A. & E., at p. 301; *The Augusta* (1812), 1 Dods., at p. 287.
(*c*) *The Gratitudine* (1801). 3 C. Rob., at p. 261; *The Karnak* (1868), L. R. 2 A. & E., at p. 310.
(*d*) *The Pontida* (1884), 9 P. D., at p. 180.
(*e*) *The Hamburg* (1864), B. & L. 253, 273.
(*f*) *Duncan* v. *Benson* (1849), 1 Ex. 537; 3 Ex. 644.

(v) SALVAGE.

This is a reward allowed to persons who save a ship, apparel and cargo, or what had formed part of these, or freight from shipwreck, capture, or similar jeopardy (*g*). The right to salvage may, but does not necessarily, arise out of contract (*h*). To support the claim the salvor must show : (1) That the services rendered were voluntary ; (2) that there was skill and peril, and some enterprise shown in the performance of the work ; (3) that the services were beneficial.

The salvor has a maritime lien, extending to ship, freight, cargo, upon the property salved, the lien ranking first, above all other liens which have already previously attached to the property. The cargo owners are liable for salvage, and in proportion to its value rateably with the other property salved (*i*).

The amount payable for salvage is generally assessed by the court, but it is quite competent for the masters of the vessels concerned to enter into an agreement before assistance is rendered fixing the amount to be paid. The master of the salving vessel can bind his owners and crew by such an agreement if it is fair and honest (*k*) ; but the agreement will be set aside if it is inequitable. An agreement to pay an exorbitant sum coupled with the fact that the master of the vessel about to be salved is acting under the stress of circumstances, will be treated as inequitable (*l*).

(*g*) *Wells* v. *Owners of Gas Float Whitton*, [1897] A. C., at p. 344.
(*h*) *Five Steel Barges* (1890), 15 P. D. 142 : *per* HANNEN, P., at p. 146.
(*i*) *The Longford* (1881), 6 P. D. 60.
(*k*) *The Nasmyth* (1885), 10 P. D. 41.
(*l*) *The Medina* (1877), 2 P. D. 5 ; *The Rialto*, [1891] P. 175 ; *The Port Caledonia*, [1903] P. 184.

The salvage money is apportioned between the owners, master, officers and crew of the salving vessel. Except in the case of a seaman belonging to a ship employed on salvage service, a seaman cannot agree to abandon any right that he may have or obtain in the nature of salvage (*m*).

(vi) Position of the Seamen.

Agreement for Service.—Every agreement may, if the ship is a home-trading ship (*n*), and must, if it is a foreign-going ship, be entered into before a superintendent of a mercantile marine office, and must be read over to the seaman by the superintendent, or he must otherwise ascertain that the seaman understands it; and the seaman must sign in the superintendent's presence (*o*). In the case of a home ship, the agreement may be explained by the master, and the seaman's signature may be affixed in the presence of any attesting witness (*p*).

Seamen shipped in the British possessions are to be engaged before some superintendent, or if there be none, then before some officer of Customs (*q*); and seamen shipped in foreign ports are to be engaged before the consul, and the sanction of such consul shall be indorsed upon the agreement, and he shall state the fact of his attestation of the agreement (*q*).

(*m*) Section 156.

(*n*) Sections 115, 116.

(*o*) Section 115. Different rules apply to substitutes. See same section.

(*p*) Section 116; as to the length of time during which the service may be made to last, and for regulations regarding running agreements, see ss. 115 *et seq.*

(*q*) Section 124.

The form of agreement for ordinary use is one sanctioned by the Board of Trade ; it must be dated at the time of the first signature, and must be signed first by the master, then by the seaman. It must contain (i) the nature, and (so far as possible) the duration of the intended voyage, or the maximum period of the voyage, and the places or parts of the world, if any, to which the voyage is not to extend ; (ii) the number and description of the crew, specifying how many are engaged as sailors ; (iii) the time at which each seaman is to be on board or to begin work ; (iv) the capacity in which each seaman is to serve ; (v) the wages ; (vi) a scale of the provisions to be furnished to each seaman ; (vii) regulations as to conduct, punishment, etc. (*r*).

It is usual for the crew to agree to conduct themselves in an orderly manner, and to obey the master in all matters relating to the ship ; provisions not contrary to law may be inserted (*s*), but these are always looked at jealously and construed most strictly in favour of the seaman. A provision is contrary to law which is inconsistent with any of the provisions of the Act. Accordingly, the master cannot stipulate for the right to make deductions from wages without leave, which differ in amount and are enforceable in a different manner from those provided by the Act (*t*). No stamp duty is required on the contract (*u*).

The agreement may be put an end to, and the seaman be discharged in the various ways in which a

(*r*) Section 114. (*s*) Section 114 (3).

(*t*) *Mercantile Steamship Co.* v. *Hall*, [1909] 2 K. B. 423, and see *post*, pp. 498, 499.

(*u*) Section 721.

contract can ordinarily be terminated. But when a seaman is discharged in the United Kingdom on the termination of his engagement from a foreign-going ship the discharge must take place before a superintendent, and the master must sign a form containing a statement as to the conduct, character, and qualification of the seaman, or he may in the said form state that he declines to give an opinion upon these matters (*x*). Independently of the contract, a seaman is not liable to discharge, unless his capacity is impaired, or unless he has been guilty of any offence, in which case he may be tried before a naval court (*y*), and may be condemned to discharge (*z*).

The transfer of a British ship to another owner out of the King's dominions operates to discharge the seaman, unless he consents in writing in the presence of the proper authority to complete the voyage, if continued; if the seaman does not so consent, the master must give him a proper certificate of discharge, pay his wages, and make adequate provision for his maintenance and repatriation (*a*).

If a master for any cause finds it necessary to discharge abroad any sailor belonging to his ship, he must obtain the sanction of the proper authority as defined by the Act, and this must be endorsed on the agreement with the crew. This is not necessary when a sailor is discharged at a port in the country in which he was shipped (*b*). A similar

(*x*) Sections 127, 129.

(*y*) As to its constitution, see s. 481.

(*z*) Section 483 (1) (c).

(*a*) Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), ss. 31—33.

(*b*) Merchant Shipping Act, 1906, ss. 30, 49. There are various provisions in this case for the protection of the seamen's interests.

certificate is required where a seaman is left behind abroad (*c*).

General Rights of the Seaman.—Possibly the most important of the rights of the seaman is given him by the section in which it is enacted that, notwithstanding any agreement to the contrary, it shall always be an implied term in every contract with the seaman, that the owner or his agents shall use every reasonable endeavour to make and keep the ship seaworthy (*d*).

Amongst his other rights are these: (i) to be employed, and he is entitled to compensation (not exceeding one month's wages) if he is improperly discharged within one month of his beginning to earn wages; such compensation being in addition to the wages actually earned (*e*); (ii) to have a copy of his agreement posted up in some accessible place (*f*); (iii) to be properly fed, and to receive compensation for short or bad provisions; any three or more seamen may complain to any officer in command of a King's ship, or to a consular agent, or superintendent of a mercantile marine office, and such officer shall forthwith inspect the food, and shall report, accordingly; the captain is bound to obey the officer's directions, but the seamen are liable to forfeit a week's wage if their complaint is groundless (*g*). In cases where an agreement with the crew is required, the master must also furnish provisions in accordance with a statutory

(*c*) Merchant Shipping Act, 1906, s. 36.
(*d*) Section 458.
(*e*) Section 162.
(*f*) Section 120.
(*g*) Sections 198 *et seq.*; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), ss. 25, 26.

scale (*h*), and every British foreign-going ship of a thousand tons and upwards going to sea from any place in the British Islands, or on the continent of Europe between the River Elbe and Brest inclusive must carry a duly certificated cook (*i*); (iv) to be attended free of charge if he receives any hurt or injury in the service of the ship, or suffers from illness not due to his own wilful act or default (*k*); this obligation ceases after the seaman has been brought back to a home port (*l*); (v) in certain cases to be relieved, maintained and sent to a proper return port (*m*), if found shipwrecked or in distress abroad (*n*).

Wages.—These he may claim from the date settled in the agreement for him to begin work, or from when he first begins work, whichever happens first (*o*); and he remains entitled until the expiration of the agreed-upon time. It was formerly the rule that unless freight was earned wages did not become due, for "freight is the mother of wages." This no longer holds good, and a seaman is entitled to wages though no freight has been earned, unless, in cases where the ship has been wrecked or lost, he did not exert himself to the utmost to save it (*p*).

(*h*) Merchant Shipping Act, 1906, s. 25 (1).
(*i*) *Ibid.*, s. 27.
(*k*) *Ibid.*, s. 34.
(*l*) *Anderson* v. *Rayner*, [1903] 1 K. B. 589.
(*m*) *I.e.*, either the port at which the seaman was shipped, or a port in the country to which he belongs, or in the case of a discharged seaman some port agreed to by him at the time of discharge. In the case of a seaman belonging to a British possession who has been shipped and discharged out of the United Kingdom, the proper officer may treat a port in the United Kingdom as a proper return port (Merchant Shipping Act, 1906, s. 45).
(*n*) Merchant Shipping Act, 1906, ss. 40—42, 46—48.
(*o*) Section 155. (*p*) Section 157.

The time within which wages must be paid is as follows: (1) a home ship, within two days after the termination of the agreement, or at discharge, whichever occurs first (*q*); (2) foreign-going ships (with certain exceptions), within two clear days after the seaman leaves the ship (exclusive of Sundays and bank holidays); but the seaman must be paid £2 or one-fourth of the wages due to him (whichever is least) at the time when he lawfully leaves the ship at the end of his engagement (*r*). An account of the wages, with all deductions specified, must be delivered to the seaman, or to the superintendent, not less than twenty-four hours before discharge or payment off (*s*). If the seaman is discharged before a superintendent (*t*) his wages must be paid through or in the presence of that officer, unless a competent court otherwise direct (*u*).

If the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship, or his unfitness or inability to proceed on the voyage, he is entitled to wages only up to the time of such termination (*v*); but where a British ship was captured and confiscated for carrying contraband during the war between Russia and Japan, the master knowing, but the crew not knowing, the nature of the cargo, it was held that the service of the seamen was not terminated "by loss of the vessel" within the meaning of the section (*x*). Nor is a seaman who has

(*q*) Section 135.
(*r*) Section 134.
(*s*) Sections 132, 133.
(*t*) *Ante*, p. 495.
(*u*) Section 131.
(*v*) Section 158.

(*x*) *Austin Friars Steam Shipping Co.* v. *Strack*, [1905] 2 K. B. 315. In *Sirewright* v. *Allen*, [1906] 2 K. B. 81, it was held that the capture and detention of a ship without any fault on the part of the owner, did terminate the service of the seamen.

agreed to serve for an ordinary commercial voyage of a peaceful nature bound, at the request of the master during the voyage, to proceed with a contraband cargo to a belligerent port at the risk of capture and its consequences. His refusal to do so will not affect his right to wages (*y*).

The wages, or part of them, may be forfeited on the following grounds: (1) desertion (*z*), the rules and penalties relating to this offence being very severe; (2) neglecting without reasonable cause to join the ship, or absence without leave within twenty-four hours of sailing from any port (*z*); (3) quitting the ship without leave after her arrival in port, before she is in a place of security (*a*); (4) wilful disobedience (*a*); (5) continued wilful neglect of duty (*b*); (6) embezzlement, or doing wilful damage (*a*); (7) smuggling, involving loss to the owner (*a*). In the case of desertion, he is liable to forfeit all his wages; in other cases a certain amount, varying with the circumstances.

Duties of the Seaman.—The duties of a seaman are to join his vessel and to do his proper work upon it until the termination of his agreement, and he must obey his superior officers, though the command be given in a rough or unmannerly way (*c*). He must devote the whole of his time to his employer's service, and do his best under all the emergencies of the voyage, and any agreement to pay extra for ordinary duties is void (*d*).

(*y*) *Palace Shipping Co., Limited* v. *Caine*, [1907] A. C. 386.
(*z*) Section 221.
(*a*) Section 225. (*b*) Sections 159, 225.
(*c*) *The Exeter* (1799), 2 C. Rob. 261.
(*d*) *Stilk* v. *Meyrick* (1809), 2 Camp. 317.

Remedies.—(i) Right of action. A seaman's remedies are by suit against the owners or against a master who engaged him in the King's Bench, or against the owner or the master *in personam*, or the ship and freight *in rem* (*e*) in the Admiralty division; if the amount is under £150 he may sue in the county court (*f*), and if not exceeding £50 in a court of summary jurisdiction (*g*). (ii) Lien. A seaman has a maritime lien on the ship and freight for his wages, and this he may enforce by means of arrest and an action *in rem* in Admiralty. His right is against the ship, but not the cargo, and if he has rendered services to her, the fact that they were not rendered at the request, or even with the knowledge of its present owner, is no bar to his claim. The seaman cannot by any agreement forfeit his lien (*h*). This lien takes priority of that of a mortgagee, of that of a master, and of the charge of a bottomry bondholder, so far as the wages were not earned on a voyage prior to the advance on the bond (*i*).

(*e*) Admiralty Court Act, 1861 (24 & 25 Vict. c. 10); Kay on Shipmasters, s. 509.

(*f*) 31 & 32 Vict. c. 71, s. 3.

(*g*) Act of 1894, s. 164.

(*h*) Section 156.

(*i*) *The Hope* (1873), 28 L. T. 287.

STOCK EXCHANGE TRANSACTIONS.

Transactions on the London Stock Exchange are contracts for the purchase or sale of "securities" (*a*). They are governed by the ordinary law of contract, but owing both to the peculiar nature of "securities" and to the customs of the "exchange," or market, where they are made, they are entered into subject to various terms, both express and implied.

The Rules of the Stock Exchange.

The London Stock Exchange is of the nature of a club. Membership is limited; members are elected by a committee for one year at a time, and must then apply for re-election; the management of the Stock Exchange is in the hands of the committee, and the conduct of business is regulated by printed rules issued by the committee; and any dispute between members must be referred to the committee. Members are either jobbers or brokers; brokers are agents for outside clients; jobbers are never agents; brokers need not always be agents, they too may buy or sell on their own account; but members of the Stock Exchange are

(*a*) The word "securities" has been adopted by the rules of the Stock Exchange to include all forms of personal property there dealt in. It is not strictly accurate, as shares in and capital stock of a company are not "securities" for the repayment of money; but the word applies to bonds, debentures, debenture stock, and stock in the public funds.

Stock Exchange securities are *choses in action* (see *ante*, p. 53, note (*f*)); they are expressly excluded from the definition of "goods" in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); consequently, contracts for the purchase or sale of securities need not be in writing.

always personally liable to one another whether they are principals or agents. All contracts are made for settlement on some particular day. In the case of an issue of new securities the committee of the Stock Exchange fix the day; this is called "special settlement." In the case of other securities, bargains, unless otherwise marked, are for completion on the settling day of the current account; there are twelve "accounts" in the year for consols, twenty-four for other securities; the settlement is at the end of the account; different securities may have different "settling days" or "pay days."

The contract for the purchase or sale of securities is ordinarily made by a broker, acting on behalf of his client, with a jobber. The jobber has two alternatives: either he may buy or sell upon his own account, in which case he is a principal and privity of contract is established between him and the broker's client, or he may discharge his own liability to pay for or to deliver the securities by furnishing the name of someone else able and willing to complete the bargain (*b*). If the latter alternative is adopted, the process is somewhat as follows: The jobber, who, let us suppose, has undertaken to purchase securities from a broker, resells the securities to another jobber or to a broker, and that

(*b*) *Nickalls* v. *Merry* (1875), L. R. 7 H. L. 530. The jobber "makes a price" for the broker without knowing whether the broker intends to buy or sell. The difference between the buying price and the selling price of a security on any particular day is called the "market turn," and the jobber makes his profit by purchasing at the lower and selling at the higher price or as near as he can get in his bargain with the broker.

In attempting to summarise the practice of the Stock Exchange, it is impossible to do more than describe in outline the most important features. In Stock Exchange cases, expert evidence is always required of the practice of the Stock Exchange in relation to the contract in question.

jobber or broker resells them to another, and so on; finally on the day called "ticket day," which immediately precedes "pay day," the broker who is the last purchaser of the securities in question issues a ticket containing particulars of the securities and their price, his own name as the paying broker, the name of his client to whom the securities are to be transferred, and the name of his immediate seller; this ticket he passes to his immediate seller, who adds the name of the person from whom he bought, and then passes it back to him, and so it is passed through the other intermediate buyers and sellers till it reaches the hands of the jobber; the jobber passes the "name" to the original selling broker, and as soon as the "name" has been accepted the jobber is discharged from the contract, and his place is taken by the ultimate purchaser (*c*). The broker who issues the ticket represents that the person whose name is on the ticket is his principal; that he has authority to bind him; that he is a person capable of accepting the shares; if these representations are untrue the broker is liable to anyone who may have incurred loss in consequence (*d*).

The securities must be paid for on pay day. The price of the securities on pay day is in certain cases officially fixed two days beforehand and is then referred to as the "making up" price (*e*). In the case of other securities there is no official "making up" price. If the securities "make up," the ultimate purchaser pays

(*c*) *Coles* v. *Bristowe* (1868), L. R. 4 Ch. 3; *Maxted* v. *Paine* (2) (1871), L. R. 6 Ex. 132.

(*d*) *Merry* v. *Nickalls* (1872), L. R. 7 Ch. 733: *per* MELLISH, L.J., at p. 755.

(*e*) Elaborate arrangements exist by which the Clerk of the House ascertains the price at which dealings have taken place, and fixes the "making up" price accordingly.

the making up price to the original seller, and each member on the line along which the bargain is traced settles with his immediate contracting party by paying to or receiving from him the difference between the price of the bargain between them and the making up price. The same result is obtained, though in a slightly different way, in the case of other securities. The passing of the ticket and the settlement of everybody's accounts is now largely accomplished by means of the "settlement department," which acts in the manner of a clearing house.

Next the securities have to be delivered by the original selling broker to the ultimate purchaser. The rules of the Stock Exchange fix the days on which securities have to be delivered, different days being fixed for different kinds of securities (*f*). Thus, bearer securities must be delivered on pay day, consols on consol pay day, other securities within a certain number of days of pay day. If the seller fails to deliver the securities to the purchaser on the proper day, the purchaser may apply to the buying-in and selling-out department of the Stock Exchange. After public notice has been given, the officials of the department "buy in" the securities, thereby providing a member who will deliver the securities to the purchaser. The seller through whose fault the

(*f*) Securities are of different kinds, and are therefore transferable in different ways; some require a deed of transfer and the production of certificates; others, like bearer bonds, pass by delivery (they may or may not be negotiable instruments, see *ante*, pp. 287, 295, 296). The word "scrip" is often applied to bearer securities, but it means strictly the document sent out, when a new loan or new stock is issued, to those who will be entitled to certificates or bonds or bearer shares, as the case may be. Other securities again are transferable by inscription in the books of the Bank of England and certain other banks.

securities were not delivered at the proper time is liable to make good any loss incurred by the purchaser. A similar remedy is open to the seller of securities, if the purchaser fails to pass the name of a person to whom the securities are to be transferred. In this case the officials of the buying-in and selling-out department sell the securities, thereby furnishing the seller with a "name" to whom the securities may be transferred.

In the event of the person in fault not being able to meet his liabilities, which have arisen from his not having given a name or not having delivered the securities as the case may be, the dealer next to him becomes liable, and on his failure the next, and so on all down the line till the liability is met.

The liability of intermediaries as buyers continues till a name has been accepted by the selling broker ; for even when a name has been passed the selling broker may object to the name on various grounds, such as that he is a foreigner resident abroad, or an infant, or a person whom the company will not accept as a shareholder ; in such a case if the objection is upheld, with or without reference to the committee of the Stock Exchange, another name must be substituted.

However, by the rules of the Stock Exchange, a limit is put to the time within which the ultimate parties must buy in or sell out, as the case may be, and when this period has elapsed (it differs in length according to the nature of the securities) the intermediaries are automatically released. The law, however, does not recognise the release of the intermediaries where a name has been passed of a person, such as an infant, who cannot contract, or of a person without his authority, because in such cases the seller cannot

compel the supposed purchaser to complete the contract; the name must be that of a person "able" to contract and willing to enter into the contract in question: the fact that he turns out to be impecunious does not prevent the intermediaries being released if his name has been accepted or the period allowed by the rules has elapsed (*g*).

Should the purchaser not wish to take up the securities on the account day named, he may be able to arrange a "continuation" or "carry over" to the next account. Two days before the account day (in the case of mining securities, three days), called "contango" day, he sells the shares, usually to the dealer from whom he has bought them and buys back the same shares for the next account, paying either interest on the securities or a fixed charge called "contango" (*h*): if the securities have fallen in value the purchaser must also pay the difference between the price he originally gave and the making up price. The rate of interest depends upon the state of the money market; the amount of the "contango" depends upon whether there are more "bulls," viz., persons who have bought and are not anxious to take up, or "bears," viz., persons who have sold and are not anxious to deliver, in the market. "Bulls" are waiting for the price to go up, "bears" for the price to go down. Sometimes, therefore, the seller instead of obtaining a contango rate has to pay a rate (called "backwardation" or "back") for the "carry over."

(*g*) *Nicholls* v. *Merry* (1875), L. R. 7 H. L. 530; *Maxted* v. *Paine* (No. 1) (1869), L. R. 4 Ex. 81.

(*h*) Though the two methods of paying interest and paying a fixed charge are quite distinct, the term "contango" or "contango rate" is often used for either.

Another method of dealing on the Stock Exchange is by means of "options." A. agrees to pay a certain sum to B. for the right (which he need not exercise) of taking delivery of certain securities from B. on a future day at a named price. This is a "call." If A. agrees to pay for the right of delivering securities it is termed a "put." If A. has the choice of either taking delivery or making delivery it is termed a "put and call." A. pays the agreed amount when the option matures whether he exercises it or not.

In cases where A. buys securities from B., B. buys the same securities from C., and C. from A., no securities pass, and the transaction, which consists wholly of the payment of differences, is called making up. If A. buys from B., and B. from C., B. may ask A. and C. to "make down," and allow him (B.) to drop out on payment of differences.

Elaborate provision is made by the rules for dealing with any member who fails to fulfil his engagements. He is hammered—*i.e.*, he is publicly declared a defaulter—and thereby ceases to be a member. His assets are assigned to the "official assignee" for the benefit of his creditors on the Stock Exchange; all accounts are automatically closed at the prices current immediately before the declaration of his default (hammer prices), and the differences arising upon the defaulter's transactions are paid to or claimed from the official assignee. This equitable assignment (*i*) to the official assignee is a purely domestic arrangement affecting only his creditors on the Stock Exchange, and does not in any way

(*i*) *Richardson* v. *Stormont, Todd & Co.*, [1900] 1 Q.B. 701. The official assignee is an equitable assignee and not an agent for the defaulter.

interfere with the rights of outsiders; it is, however, an act of bankruptcy, upon which a petition can be brought within three months (*k*); the official assignee cannot, therefore, safely distribute the assets till that period has elapsed, but in the meantime, and until the commencement of bankruptcy proceedings, which any creditor may bring, the assignment is good against outside creditors (*l*). The assets in the hands of the official assignee may include the proceeds of "differences" arising upon the close of bargains at the hammer price in favour of the defaulter; the fund thus created is a purely artificial fund provided by members of the Stock Exchange as a result of rules made for their convenience, for they are under no legal liability to fulfil their part of the contract with a person who has declared his inability to fulfil his part; consequently if the defaulter is later declared bankrupt this fund does not form part of his assets, and does not, therefore, pass to his trustee in bankruptcy (*m*).

LEGAL EFFECT OF THE RULES.

In dealing with the practice of the Stock Exchange we have necessarily somewhat anticipated a discussion of the question as to the legal effect of the rules of the Stock Exchange. As between members of the Stock Exchange the legal effect of the rules, though of academic interest, is of small practical importance, because

(*k*) *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213; *Richardson* v. *Stormont, Todd & Co.*, [1900] 1 K.B. 701; *Lomas* v. *Graves*, [1904] 2 K.B. 557 [C.A.]; *Ponsford Baker & Co.* v. *Union of London and Smith's Bank*, [1906] 2 Ch. 444 [C.A.]. Some doubt has been thrown on this proposition, see *In re Mendelssohn*, [1903] 1 K.B. 216 [C.A.], *per* VAUGHAN WILLIAMS, L.J., at p. 223, but the language in the cases quoted above is clear enough.

(*l*) *Tomkins* v. *Saffery*, *supra*; *Lomas* v. *Graves*, *supra*.

(*m*) *In re Plumbly, Ex parte Grant* (1880), 13 Ch. D. 667 [C.A.].

the committee can expel a member for a breach of the rules or refuse to re-elect him at the end of the current year; moreover, all disputes between members are referred to the committee, as members are expressly forbidden by the rules to sue one another at law. The legal effect of the rules becomes important when the relations existing between outsiders and members of the Stock Exchange have to be considered (*n*).

The effect of Stock Exchange contracts being made subject to the rules and regulations of the London Stock Exchange is, that the client is taken to be cognisant of the rules and regulations and is bound by them, and the broker is entitled to be indemnified by the client for all that he does in accordance with those rules (*o*); but the client is not bound by the rules if they are either illegal or unreasonable *and* not known to him (*p*). The printed rules of the Stock Exchange are now taken to be known to the client, but he is not bound by a custom as such without evidence of his being acquainted with it (*q*). The fact that the custom is unreasonable or illegal, such as the custom to disregard Leeman's Act (*r*), is good ground for supposing that the client has not consented to be bound by it (*s*), but

(*n*) Owing to the fact that members of the Stock Exchange are personally liable to one another, whether they are agents for an outside client or not, and that disputes arise only upon the failure of a member, the form of contract about which there is litigation is usually one made by a broker on behalf of a client with a jobber acting as principal. At any rate it will be convenient in considering the legal effect of the rules to have this kind of contract chiefly in view.

(*o*) *Chapman* v. *Shepherd* (1867), L. R. 2 C. P. 228: *per* WILLES, J., at p. 238; *Forget* v. *Baxter*, [1900] A. C. 467, at p. 479. See *ante*, p. 129.

(*p*) *Smith* v. *Reynolds* (1892), 66 L. T. 809 [C. A.].

(*q*) *Benjamin* v. *Barnett* (1903), 8 Com. Cas. 244; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 818; *Neilson* v. *James* (1882), 9 Q. B. D. 546.

(*r*) See *ante*, p. 30.

(*s*) *Perry* v. *Barnett* (1885), 15 Q. B. D. 388. See *ante*, p. 131.

it is not conclusive (*t*); nor is the client discharged merely because the custom contradicts the ordinary law of contract; thus there is a well-recognised usage that a purchaser of securities is not entitled to refuse acceptance of part only of the securities, though according to ordinary law he could insist on a tender of the whole amount or none; a broker may obtain securities from different sellers and the client must indemnify him for those which he has paid for (*u*).

But the position of the client is not affected by resolutions of the committee of the Stock Exchange if they have the effect of altering his contract; thus, where the client is a purchaser and the seller is unable to make delivery, a resolution of the committee may suspend the right of the client's broker to "buy in" the securities; in these circumstances the client, in spite of the resolution, may refuse to accept postponed delivery of the securities and thus repudiate the contract; the broker will ultimately have to accept the securities and pay for them according to the rules of the Stock Exchange, but the client will be under no liability to indemnify him (*x*).

Similarly the client is not affected by what takes place after a member has been declared a defaulter. If the broker is "hammered," since privity of contract exists between the client and the jobber, the client may either pay for and take up the shares himself or he may appoint another broker to take the place of the

(*t*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460.

(*u*) *Benjamin* v. *Barnett* (1903), 8 Com. Cas. 244.

(*x*) *Union Corporation* v. *Charrington* (1902), 8 Com. Cas. 99. In this case someone connected with the company had so manipulated affairs as to render it impossible for sellers to make delivery, and as he was a large purchaser the committee thought best to deal with the matter in the way described.

defaulter ; in any case he cannot escape his liability to complete the bargain (*y*). If the jobber is hammered the client has no remedy against the broker (*z*), but on the other hand he does not lose any rights he may have against the jobber for breach of contract on account of arrangements made by the jobber with the official assignee (*a*).

The Position of the Broker.

The broker, being an agent, must carry out his client's instructions ; his contract with the jobber must therefore exactly correspond with his bargain with his client, and his commission must be clearly shown on the contract note which he issues to his client, otherwise the client may immediately repudiate the contract on the ground that the agent is making a secret profit out of the transaction (*b*). If the commission is being shared with banker or solicitor this too should be shown on the contract note. Similarly, if the broker sells before the date upon which he is instructed to sell the client may repudiate the contract (*c*). Again, if instead of making a contract for his client with a jobber he acts as principal without the knowledge or consent of his client and sells to him securities of his own, the client may repudiate the transaction altogether (*d*). Of course

(*y*) *Leritt* v. *Hamblet*, [1901] 2 K. B. 53 [C. A.] ; *Currie* v. *Booth* (1902). 7 Com. Cas. 77. See *ante*, p. 131.

(*z*) *Gill* v. *Shepherd & Co.* (1902), 8 Com. Cas. 48.

(*a*) *Leritt* v. *Hamblet*. *supra: per* Collins, L.J., at p. 63, following *Nickalls* v. *Merry* (1875). L. R. 7 H. L. 530.

(*b*) This is the ordinary law of agency, but it was specially applied to Stock Exchange transactions in *Johnson* v. *Kearley*, [1908] 2 K. B. 514 ; *Stubbs* v. *Slater*, [1910] 1 Ch. 632 [C. A.]. See *ante*, p. 123.

(*c*) *Ellis* v. *Pond*, [1898] 1 Q. B. 426 [C. A.].

(*d*) *Johnson* v. *Kearley*, *supra*. See *ante*, p. 122.

there is nothing to prevent a broker acting as principal if the client consents; and in every case it is a question of fact whether or not a broker is acting as principal, and if he is a principal whether or not the client has consented to deal with him as such. Thus a broker may purchase a block of shares on the market, allocating some to his client and keeping the rest for himself, but this does not make him a principal in respect of the shares he allocates (*e*).

If the broker charges no commission but renders either a *net* contract (*f*) or charges interest on the purchase price until the client takes the securities up and pays for them he is primâ facie a principal (*g*). Since the client is bound to indemnify the broker against the claims of the jobber it is the duty of the broker, in the event of the client not being able to meet his engagements, to minimise the loss as far as possible (*h*). If the client declares his inability to complete the purchase of securities the broker may immediately close the account, *i.e.*, pay for and take up the securities instead of arranging for a "carry over"; a subsequent sale of the securities at the best price obtainable so as only to charge the client with the difference between the purchase price and the price at which they were sold is the ordinary and legitimate method of minimising the client's loss (*i*).

The broker may repurchase the shares for himself without necessarily vitiating the previous sale, but if

(*e*) *Scott* v. *Godfrey*, [1901] 2 K. B. 726.

(*f*) *Johnson* v. *Kearley*, [1908] 2 K. B. 514.

(*g*) *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166.

(*h*) *Walter* v. *King* (1897), 13 T. L. R. 270.

(*i*) *Macoun* v. *Erskine, Oxenford & Co.*, [1901] 2 K. B. 493 [C. A.]; *Lacey* v. *Hill (Crowley's Claim)* (1874), L. R. 18 Eq. 182.

the sale and repurchase are substantially one transaction and a profit arises upon it, the broker must account to his client for the profit made (*k*).

If a client instructs his broker to "carry over" certain securities he undertakes to pay "the difference," interest or "contango," and commission to the broker himself for arranging the carry over. The broker's commission may be included in the "contango" or the interest, and need not appear separately on the continuation note (*Stubbs* v. *Slater*, [1910] 1 Ch. 632 [C.A.]). If the client fails to provide the broker with sufficient cover to carry the stocks over again, the broker may close the account (*Lacey* v. *Hill, Scrimgeour's Claim* (1873), L. R. 8 Ch. 921; *Davis* v. *Howard* (1890), 24 Q. B. D. 691). Every "continuation" is a fresh contract; a continuation note should therefore be issued by the broker to his client at every account, even though he has instructions to carry over till further notice, and on the death of the client the broker must close the account (*l*). The broker may "take in" his client's securities, *i.e.*, carry them over himself, but he thereby becomes a principal for the time being instead of an agent, and his conduct must have the approval of his client (*m*).

GAMBLING ON THE STOCK EXCHANGE.

Gambling on the Stock Exchange so as to make the contract void under 8 & 9 Vict. c. 109, s. 18 (*mm*), takes place whenever there is an agreement between the purchaser and the seller not to take up or deliver the

(*k*) *Erskine, Oxenford & Co.* v. *Sachs*, [1901] 2 K. B. 504 [C. A.].
(*l*) *In re Overweg, Haas* v. *Durant*, [1900] 1 Ch. 209.
(*m*) *Petre* v. *Sutherland* (1887), 3 T. L. R. 422.
(*mm*) See *ante*, p. 26.

securities which they are buying and selling, but to settle their business by the payment of the difference between the price at which the securities were bought or sold and the price on pay day: the purchaser pays the difference if the price has fallen, the seller if it has risen (*n*).

Speculation on the Stock Exchange is not gambling provided the liability to take up or deliver securities is a real one. Thus, a speculating client instructs his broker to buy securities which he has no intention of taking up, hoping to make a profit out of differences on a resale when the price rises: the price falls, and he instructs his broker to carry over the securities to the next account, and so on from account to account in the expectation of an ultimate rise; but though the client has no intention of ever taking delivery, the broker may at any time refuse to arrange a carry-over again, and may close the account at the next settlement, thus putting upon the client a liability to pay for and take up the shares: the client is usually unable to pay, the securities are therefore sold and the client escapes with the payment of a difference, but the liability to pay this difference arises from "a genuine transaction of commerce" and not from gaming (*o*). On the other hand, the mere fact that the parties in their contract insert a clause entitling the purchaser to insist on delivery, if he desires it, is not sufficient to make the contract genuine (*p*). The whole transaction has to be looked

(*n*) *Forget* v. *Ostigny*, [1895] A. C. 318, following *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685. It follows from what has been said above on p. 509, that the question of gambling only arises when at least one of the parties is not a member of the Stock Exchange.

(*o*) *Cullum* v. *Hodges* (1901), 18 T. L. R. 6 [C. A.]; *Thacker* v. *Hardy*, *supra*; *cf. Stubbs* v. *Slater*, [1910] 1 Ch. 632 [C. A.].

(*p*) *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166; *In re Grey*, [1899] 1 Q. B. 794 [C. A.].

at in order to discover whether or not in fact it is a gaming transaction. Thus, when the speculating client deals with his broker as with a principal the transaction is probably of a gambling nature (*q*). The client agrees to buy certain securities from the broker; the broker never buys the securities in the market, but at each account credits or debits his client with the difference between the price at which the client agreed to buy and the market price on pay day. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature (*r*). This is exactly what happens when the broker is a principal, he makes his profit out of the losses of his client (*s*). When the broker is an agent he gets his remuneration out of his commission, and the rise or fall of the market makes no difference to him (*t*).

Blank Transfers and Forgeries.

The legal effect of signing a transfer in blank in order to enable the broker or the transferee to insert the description of the securities to be transferred depends upon whether the securities are transferable in writing only or by deed. If they are transferable in writing the transferee has authority to fill up the

(*q*) A broker, whether a member of the Stock Exchange or an outside broker, is an agent, and what was said above as to the duties of a broker applies equally to both kinds; gambling is usually done through outside brokers whose business is called the keeping of a "bucket shop."

(*r*) *Thacker* v. *Hardy*, *supra*.

(*s*) But even in such a case there may be evidence to show that delivery was intended, and that the bargain was a genuine and not a gaming transaction (*Cullum* v. *Hodges*, *supra*; *Whitlard* v. *Davis* (1894), 10 T. L. R. 425).

(*t*) *In re Hewett* (1893), 9 T. L. R. 166 [C. A.].

blanks (*u*); if the securities are transferable only by deed then transfers executed in blank are not valid as deeds, and if they are filled up by the broker or the transferee, must be redelivered by the transferor (*x*); but it has been suggested—and there is no decision to the contrary—that if the broker fills up the blanks with a description of the securities which he has been authorised to insert, the client would be estopped from asserting that he had only signed in blank and that the deed was consequently void (*y*).

By the rules of the Stock Exchange (which in this case express the rule of law) stockbrokers are personally liable if they obtain a transfer of securities by means of a forged transfer, and they are bound to replace the securities so transferred (*z*). Similarly, a broker who induces the Bank of England, or any other bank where stock is inscribed, to transfer stock under a forged power of attorney, is liable in an action for breach of an implied warranty of authority to indemnify the bank against the claim of the stockholder for restitution (*a*).

STAMP DUTIES.

The regulations governing the duties to be paid on various Stock Exchange transactions are to be found in

(*u*) *In re Tahiti Cotton Co., Ex parte Sargent* (1874), 17 Eq. 273.

(*x*) *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200; *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20; *France* v. *Clarke* (1884), 26 Ch. D. 257.

(*y*) *Per* Sir G. MELLISH, L.J., in *Hunter* v. *Walters* (1871), L. R. 7 Ch. App. 75, 87, explaining *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175 [Ex. Ch.] (when the broker had filled up the blanks with the wrong shares).

(*z*) *Reynolds* v. *Smith* (1893), 9 T. L. R. 494 [H. L.].

(*a*) *Starkey* v. *Bank of England*, [1903] A. C. 114; *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208 [C. A.]. And see *ante*, p. 138.

the Stamp Act, 1891 (54 & 55 Vict. c. 39) (referred to as the principal Act) as amended by the Customs and Inland Revenue Act, 1893 (56 Vict. c. 7), by the Finance Act, 1899 (62 & 63 Vict. c. 9), and by the Finance (1909-10) Act, 1910 (10 Edw. 7 c. 8).

Brokers are obliged to issue contract notes, the duty on which varies according to the value of the security dealt with. This amount varies from 6*d.* when the value is over £5 and less than £100, to £1 where the value exceeds £20,000 (*b*). An exception is made in the case of notes sent by a broker to his principal when the principal is himself acting as broker or agent for a principal, and is either a member of a stock exchange in the United Kingdom, or a person who bonâ fide carries on the business of a stockbroker in the United Kingdom and is registered as such in the list of stockbrokers kept by the Commissioners of Inland Revenue.

Besides the duty payable on the contract note, *ad valorem* duties of 1*s.* 3*d.* per £50 up to £300 and 2*s.* 6*d.* for every £100 or fractional part of £100 above £300, are chargeable on the transfers themselves of marketable securities. The expression "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom. A distinction is made between securities not transferable by delivery and those which are. The latter are charged at double the rate at which the former are charged, but the duty is only paid once, viz., on the occasion of the first transfer. Foreign securities issued

(*b*) Before 1910 it was 1*d.*, when the value of the securities was less than £100, and 1*s.* when the value was more than £100.

in the United Kingdom, or securities the interest upon which is payable in the United Kingdom, are liable to stamp duty, as are colonial government securities. Canadian government stock, and colonial stock to which the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59) applies, are charged 2*s.* 6*d.* for every £100 and any fractional part of £100. No distinction is now (since 1910) made between a voluntary disposition *inter vivos* and a transfer on sale. In the case of a voluntary disposition the duty must be paid on the value of the security, in the case of a sale on the amount of the consideration for the sale. When the system of passing a name is adopted, the duty is charged on the price paid by the ultimate purchaser.

Transfer of stock of the Bank of England is charged with a fixed duty of 7*s.* 9*d.* Transfer of shares in the Government or parliamentary stocks or funds are exempt from all stamp duties.

PART IV.

BANKRUPTCY.

The earliest bankruptcy statutes date back to the time of Henry VIII., and of Elizabeth and James I. Before 1861 the advantages of bankruptcy belonged only to those who came under the category of traders, but in an Act of that year non-traders were included amongst those who could be made bankrupt. On January 1st, 1884, the present *Bankruptcy Act*, 1883 (*a*) (since amended and supplemented by the Bankruptcy Act, 1890 (*b*)), came into force.

Who may be made Bankrupt.—(1) An infant may probably be made a bankrupt if the debt on which the bankruptcy is founded was incurred for necessaries, or is a judgment debt founded on a tort, but the point is not free from doubt (*c*). (2) Married women can be made bankrupt if they are trading apart from their husbands, but not otherwise, even if they are possessed of separate property (*d*), and where a spinster married

(*a*) 46 & 47 Vict. c. 52.

(*b*) 53 & 54 Vict. c. 71. In this chapter the references are to the Act of 1883 where not otherwise stated. The rules referred to are the Bankruptcy Rules, 1886 and 1890.

(*c*) See Williams on Bankruptcy, p. 3.

(*d*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); *Ex parte Coulson* (1888), 20 Q. B. D. 249; but a bankruptcy notice

during an adjournment of a bankruptcy petition which had been presented against her, it was held that she was not liable to further bankruptcy proceedings (*e*). A married woman is considered to be carrying on the business so long as any debts incurred in it by her remain unpaid. It is not necessary to prove the existence of separate property at the date when the receiving order is applied for (*f*). And the fact that the husband takes some part in the management of his wife's business does not prevent it from being treated as separately carried on by the wife (*g*). (3) Aliens are included in the Act, if either (i) they are domiciled in England, or (ii) have ordinarily resided in, or have had a dwelling-house or place of business in England, within a year before the presentation of the petition (*h*). (4) Lunatics cannot commit an act of bankruptcy involving *intent*, *e.g.*, fraudulent preference; they can be adjudged bankrupt with the consent of the Court in Lunacy, but it is doubtful whether this can be done without such consent (*i*). (5) Convicts may be adjudicated (*k*). (6) A partnership may be made bankrupt; but a limited partnership must be wound up under the Companies (Consolidation) Act, 1908 (*l*). (7) A deceased

cannot be utilised against them (*Re Lynes*, [1893] 2 Q. B. 113; *In re Francis, Handford & Co.*, [1899] 1 Q. B. 566.

(*e*) *In re A Debtor*, [1898] 2 Q. B. 576.

(*f*) *Re Simon*, [1909] 1 K. B. 201.

(*g*) *In re Worsley*, [1901] 1Q. B. 309; *Re Simon*, *supra*.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (d). As to the limits of this principle, see *In re A. B. & Co.*, [1900] 1 Q. B. 541; [1901] A. C. 102.

(*i*) Williams on Bankruptcy, p. 5, and *per* LINDLEY, L.J., in *Re Farnham*, [1895] 2 Ch. 799.

(*k*) *Ex parte Greaves* (1882). 19 Ch. D. 1.

(*l*) See *ante*, p. 195.

person cannot be made bankrupt on proceedings instituted after his death. His estate may, however, be administered in bankruptcy (*m*); but where a debtor dies after presentation of the petition the proceedings will, unless the court otherwise orders, be continued as if he were alive (*n*). (8) A registered company cannot be made bankrupt, but it may be wound up under the Companies Act (*o*).

To proceed against a person in bankruptcy, it is necessary that a bankruptcy petition should be presented either by the debtor or by a creditor, and, in accordance with this petition, that a receiving order should be made. This cannot be done unless an act of bankruptcy has been committed by the debtor. There is one exception to this statement: if a judgment summons is taken out against a debtor, the court may, instead of exercising the jurisdiction to commit, with the creditor's assent, make a receiving order against the debtor; in such case, however, the debtor is deemed to have committed an act of bankruptcy at the time the order is made (*p*). The court, however, cannot make a receiving order unless there is evidence of means which would have justified the making of a committal order (*q*).

The following are acts of bankruptcy—

Acts of Bankruptcy (*r*).—(a) "If in England or elsewhere he makes a conveyance or assignment of his

(*m*) See *post*, p. 570.
(*n*) Section 108.
(*o*) Section 123; *ante*, pp. 218—237.
(*p*) Section 103 (5).
(*q*) *Re A Debtor*, [1905] 1 K. B. 374.
(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1; the parts added by the Bankruptcy Act, 1890, are those italicised in the text below.

property to a trustee or trustees for the benefit of his creditors generally."

An assignment to one or more particular creditors is not an act of bankruptcy under this head, nor is an assignment of his property by a debtor for the benefit of his trade creditors only: the act of bankruptcy here meant is a conveyance of all a debtor's property to a trustee, who is to represent all the creditors (*s*).

A creditor who has acquiesced in a deed of assignment or has recognised the title of the trustee thereunder, *e.g.*, by trading with him as such, cannot rely on the assignment as an act of bankruptcy, although he may not have assented to the deed so as to be bound thereby (*t*). But such a creditor may present a petition founded on an independent act of bankruptcy (*u*).

(b) "If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof" (*x*).

(c) "If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt" (*y*).

It should be noted that in both these sub-sections the fraudulent conveyance is the cause of its being made an act of bankruptcy; a bonâ fide conveyance or gift may be set aside, but it will not ground a petition.

(*s*) *In re Phillips*, [1900] 2 Q. B. 329.

(*t*) *Ex parte Stray* (1867), L. R. 2 Ch. 374; *Re Brindley*, [1906] 1 K. B. 377.

(*u*) *In re Mills*, [1906] 1 K. B. 389.

(*x*) The assignment of his business by an insolvent trader to a one-man company may be fraudulent and void as an act of bankruptcy. See *In re Carl Hirth*, [1899] 1 Q. B. 612.

(*y*) See *post*, p. 543.

(d) "If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house."

In this case there is no act of bankruptcy unless there be an intention to defeat or delay creditors; a mere staying at home, or going abroad, though in fact followed by delay in payment, will not be an act of bankruptcy (*z*); but, of course, all the circumstances will be looked to, and the court will find the intention, when existent, from the facts. Leaving a place of business without paying creditors or notifying the change of address is an act of bankruptcy within this sub-section (*a*).

(e) "*If execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days. Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days*" (*b*).

(f) "If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself."

(*z*) *Ex parte Brandon* (1884), 25 Ch. D. 500.

(*a*) *In re Worsley*, [1901] 1 Q. B. 309.

(*b*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1.

(g) "If a creditor has obtained a final judgment (*c*) [any person *who is for the time being entitled to enforce a final judgment* being deemed such a creditor (*d*)] against him for any amount, and execution thereon not having been stayed (*e*), has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice (*f*), or satisfy the court that he has a counter-claim set off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set-up in the action in which the judgment was obtained."

It should be noted that the judgment debt may be of any amount, and that there are but three ways of avoiding committing the act of bankruptcy, viz.:

(*c*) A garnishee order absolute is not a "final judgment" within the meaning of this section (*Ex parte Chinnery* (1884), 12 Q. B. D. 342). "A final judgment means a judgment in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or of the defendant" (Lord ESHER, in *Re Riddell* (1888), 20 Q. B. D., at p. 516).

(*d*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1.

(*e*) This would include a case where leave to issue execution was necessary and had not been obtained. See *Ex parte Ide* (1886), 17 Q. B. D. 755, and R. S. C., O. XLII., r. 10.

(*f*) If the debtor gives a promissory note, which is taken, though conditionally, the creditor cannot get a receiving order on the notice (*Ex parte Matthew* (1884), 12 Q. B. D. 506).

(i) paying; (ii) giving satisfactory security; (iii) showing a cross-claim equal to or exceeding the judgment debt, which could not have been set up in the action in which judgment was obtained.

(h) "If the debtor gives notice (*g*) to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

PROCEDURE.

The Petition.—This may be presented either by the debtor or by a creditor, or several creditors may join in doing so. The following are the conditions on which a creditor may petition (*h*): (i) the debt due to him or, if more than one join in the petition, the aggregate amount of the debts, must amount to £50; (ii) it must be liquidated and due immediately or at a certain future time; (iii) the act of bankruptcy on which it is grounded must have occurred within three months before the presentation of the petition; (iv) it must be shown that the position of the debtor is such as to render him liable to the English bankruptcy law (*i*); (v) if the creditor is secured, he must in his petition, either state that he is prepared to surrender his security, or give an estimate of its value, and in the latter case there must be a balance of at least £50 owing to him after deducting from his debt the estimated value of it (*k*). If the

(*g*) This notice need not be in writing; it suffices if the language used be such as to lead any reasonable person to suppose that the debtor intended to suspend payment (*Crook* v. *Morley*, [1891] A. C. 316). See also *In re Scott*, [1896] 1 Q. B. 619; *In re Miller*, [1901] 1 Q. B. 51; and *cf. Clough* v. *Samuel*, [1896] A. C. 442.

(*h*) Section 6.

(*i*) *Ante*, pp. 519—521.

(*k*) Section 6 (2). The trustee cannot redeem at the value so assessed (*Re Vautin*, [1899] 2 Q. B. 549).

petition is that of the debtor, he must allege in it his inability to pay his debts (*l*). Whoever presents the petition must pay the stamp duty and give a deposit (*m*); and is liable in the first instance for the costs of all proceedings under the Act down to and including the making of the receiving order (*n*).

The place of presentation is (i) the High Court of Justice, where the debtor has carried on business or has resided in the London bankruptcy district during the greater part of the six months before the presentation of the petition, or for a longer period thereof than in the district of any county court, or when he is resident abroad, or when his residence cannot be ascertained; (ii) in any other case in the county court within whose district the debtor has resided or carried on business during the greater part of the said six months (*o*). Preference is to be given to his "business" over his "residential" district (*p*).

Proceedings on the Petition (*q*).—If it is presented by the debtor, the court will at once make a receiving order; if by a creditor, an affidavit must be filed verifying the facts stated in the petition. The petition will be heard after an interval of eight days at least from the date of service, and the creditor must be prepared to prove the continued existence of his debt, the service of the petition and the act of bankruptcy (*r*).

(*l*) Section 8.

(*m*) The total amount is about £10; r. 147.

(*n*) Rule 183 by r. 125 he has a certain priority in respect of his deposit and costs.

(*o*) Sections 95, 96. As to transfers, see s. 97.

(*p*) Rule 145.

(*q*) Section 7.

(*r*) Section 7 (2).

If there are several debtors, the petition may be dismissed as against one or more alone (*s*). If there are several petitions against one debtor, or against joint debtors, these may be consolidated (*t*). If a creditor who has the conduct of the proceedings is dilatory, a new petitioner may be substituted (*u*). When a petition has been presented either by the debtor or a creditor, it may not be withdrawn without the leave of the court (*x*).

The Receiving Order.—This may be made at any time after the presentation of the petition, but, in the case of a creditor's petition, not until after the hearing.

The effect of this order is to constitute the official receiver—an officer appointed by the Board of Trade (*y*)—receiver of the property of the debtor, and to take away from the creditors all remedies against the property or person of the debtor, except from (i) secured creditors (*z*); (ii) creditors whose debts are not provable in bankruptcy (*a*); and (iii) to a certain extent, the landlord (*b*). Any proceedings (*e.g.*, action, execution) may be stayed by the court when a petition has been presented, though a receiving order has not yet been made (*c*).

If the nature of the case requires it, the official receiver may be appointed interim receiver before the making of a receiving order (*d*).

(*s*) Section 111.
(*t*) Section 106.
(*u*) Section 107.
(*x*) Sections 7 (7) and 8 (2).
(*y*) *Post*, p. 548.
(*z*) Section 9 (2).
(*a*) *Post*, p. 564, and s. 9 (1).
(*b*) *Post*, p. 562; s. 42, and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 28.
(*c*) Section 10 (2).
(*d*) Section 10 (1).

The court has a general discretion under s. 104 of the Act of 1883 to rescind its orders, and can therefore rescind a receiving order. In exercising this discretion the court is not confined to the grounds on which an order of adjudication can be annulled (*e*). If the receiving order is obtained by the presentation of a petition under circumstances which amount to an abuse of the process of the court, it will, of course, be rescinded (*f*).

Creditors' Meetings.—The first meeting is generally the most important, and is often the last. On this occasion the chief business consists of the determination whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is desirable to have the debtor adjudicated bankrupt, and if bankruptcy is resolved upon or has ensued the appointment of a trustee and a committee of inspection. This meeting may be adjourned or any particular question may be left to a subsequent meeting.

The procedure to be observed at these meetings will be found in the Bankruptcy Act, 1883, Sched. I., and in the rules of 1886 and 1890. The following points are important:

Notice must be sent to every creditor as soon as possible. The first meeting must be held not later than fourteen days after the date of the receiving order, unless the court thinks fit to order otherwise. The

(*e*) *In re Izod*, [1898] 1 Q. B. 241. For the grounds on which an adjudication can be annulled, see *post*, p. 531.

(*f*) *In re Betts*, [1901] 2 K. B. 39. In this case the debtor repeatedly presented petitions against himself for the purpose of avoiding the effect of orders for his committal. But in a proper case the debtor may relieve himself from such pressure by seeking the protection of the bankruptcy court (*In re Hancock*, [1894] 1 K. B. 585).

official receiver or his nominee shall preside at the first meeting; on subsequent occasions those present may choose their own chairman. Three creditors (if there be as many) will form a quorum, though if there be no quorum the meeting may elect a chairman, admit proofs, and adjourn. All may vote whose proofs are admitted for liquidated debts which are not contingent. The chairman may reject a proof for the purpose of voting, but his decision is subject to revision by the court. Proxies (*g*) are allowed, and these are of two kinds: (1) *general*, which empower the holder to act in all matters till the proxy is revoked; these can be given only to a manager, clerk, or other person in the regular employ of the creditor, and such employment must be stated on the face of the proxy; (2) *special*, which are authorities to act at a specified meeting or its adjournment, and to vote (i) for or against a specific proposal for a composition or scheme of arrangement; (ii) for or against the appointment of a specified person as trustee at a specified rate of remuneration, or as a member of the committee of inspection, or for or against the continuance in office of any specified person as trustee or as a member of the committee of inspection, or (iii) on all questions or any matter other than those above referred to arising at any specified meeting or adjournment thereof. In both cases, the form of proxy must be filled in by the creditor himself, by his manager or clerk, or by a commissioner to administer oaths in the Supreme Court, or by some authorised agent if the creditor is abroad, and

(*g*) See as to these, Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 22, and Bankruptcy Rules, 1886 and 1890, 245 *et seq.*; also Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. I.

be deposited with the trustee, or with the official receiver, not later than four o'clock on the day before the meeting is to be held.

A secured creditor may vote after deducting from his proof the value of his security ; but the trustee may within twenty-eight days of the vote buy him out at the estimated value *plus* twenty per cent. (*h*).

Public Examination (*i*).—The debtor must submit a statement of affairs (*k*), and as soon as possible afterwards he must undergo an examination in open court (*l*) touching his property, and his conduct with regard to it. It is the duty of the official receiver to get the appointment for examination, to give notice to the creditors and to the debtor, and to publish it in the Gazette and in a local paper (*m*).

The debtor is put upon his oath, and may be examined by the court, the official receiver, the trustee, or by any creditor who has tendered a proof or his representative authorised in writing. Notes are taken, and these must be signed by the debtor after being read over to or by him. The court may adjourn the examination if it sees fit, and, if the debtor is contumacious, may do so *sine die ;* this makes it necessary for the debtor, when he desires to have his examination

(*h*) Schedule I., rr. 10, 12. This must be distinguished from the procedure adopted when the creditor values his security for the purpose of proving for a dividend on the balance. See *post*, p. 563.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17 ; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 2.

(*k*) See *post*, p. 540.

(*l*) When the debtor cannot, from incapacity, attend the court, an order may be made dispensing with the examination, or directing that it be held at such place and in such manner as the court thinks expedient (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 2).

(*m*) Rules 184, 186.

continued, to get a fresh appointment and to bear personally the expense of advertising. Further, a warrant may be issued for his arrest (*n*). The examination must not be concluded till after the first meeting of creditors has been held, but at any subsequent time the court may declare itself satisfied.

Adjudication (*o*).—Until the debtor has been adjudged, he is, technically speaking, not yet a bankrupt. He may, at his own request, be adjudicated at the time of the receiving order (*p*). As a rule he is not made bankrupt till the creditors have met. The following are grounds for adjudication: (i) an ordinary (*q*) resolution of the creditors in favour of adjudication; (ii) that no resolution of any kind has been passed; (iii) that the creditors have not met; (iv) that a scheme has not been accepted within fourteen days after the public examination; (v) that the debtor has failed without reasonable cause to give a proper account of his affairs (*r*). In short, a debtor is always adjudicated, unless the creditors adopt a scheme or accept a composition which is satisfactory to the court, and which is actually carried into effect.

An adjudication may be annulled (1) if the court thinks that the debtor should not have been made bankrupt (*s*); or (2) if the debts are paid in full or secured to the satisfaction of the court (*t*); or (3) if a scheme is accepted after adjudication (*u*). Even where

(*n*) Rule 185.

(*o*) Section 20. (*p*) Rule 190.

(*q*) An ordinary resolution is one carried by a majority in *value* of the creditors present and voting in person or by proxy (s. 168).

(*r*) Section 16 (3). See *post*, p. 540.

(*s*) Section 35.

(*t*) Sections 35, 36. (*u*) Section 23 (2).

the debts have been paid in full, the court has discretion to refuse an order of annulment. Thus, where the bankrupt had been guilty of a falsification of his statement of affairs, and of a substantial concealment of assets, the court refused to annul the adjudication (*x*). An unconditional release given to the bankrupt is not equivalent to payment in full (*y*). As to the effect of annulment, see Bankruptcy Act, 1883, ss. 23 (2) and 35 (2).

The effect of adjudication is to make the debtor a bankrupt, and as such subject to certain disqualifications, and to vest his property in the trustee for the time being.

Discharge (*z*).—The discharge is the order of the court granting the bankrupt a release (*a*), and removing from him the status of bankruptcy.

A bankrupt may apply at any time for an order of discharge, and the court will appoint some day subsequent to the day of public examination on which to hear the application. This is heard in open court after fourteen days' notice to the creditors; and the trustee, the creditors, and the official receiver may all oppose. The official receiver's report on the debtor's conduct and affairs, which is taken as primâ facie evidence, is read, and the debtor must give notice if he intends to dispute any statement contained in it (*aa*). If the court thinks fit, it grants a discharge.

The discharge is either (i) *unconditional*, (ii) *conditional*, (iii) *suspensive*, or (iv) *conditional and suspen-*

(*x*) *In re Taylor*, [1901] 1 Q. B. 744.
(*y*) *In re Keet*, [1905] 2 K. B. 666.
(*z*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8.
(*a*) See *post*, p. 535. (*aa*) Rule 238A.

sive. An unconditional discharge frees the bankrupt at once as from the date of the order. A conditional order has the same effect, but subject to conditions binding his after-acquired property ; *e.g.*, he may be required to set aside for his creditors' benefit so much money each month ; or he may be required to consent to judgment being entered against him for a given amount (*b*). A suspensive discharge stays the operation of the order till the expiration of a certain time ; *e.g.*, two years.

The court has a discretion subject to appeal ; save that the discharge must be either refused, or suspended for at least two years, or suspended until the bankrupt has paid a dividend of 10*s.* in the £, or granted, subject to the condition of judgment being entered up against the debtor for any part of the unpaid provable debts, in the following cases, viz. :

(a) When the bankrupt's assets are not of a value equal to 10*s.* in the £ on his unsecured liabilities, unless this has arisen from circumstances for which he cannot justly be held responsible.

(b) When the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him (*c*), and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy (*d*) ;

(*b*) Execution will not be allowed to issue without the leave of the court (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (2)).

(*c*) This is strictly construed and will not apply to speculations outside the business (*In re Mutton* (1887), 18 Q. B. D. 615).

(*d*) And this without the need of skilled investigation (*Re Reed and Bowen* (1886), 17 Q. B. D. 244).

(c) When he has continued to trade after knowing himself to be insolvent ;

(d) If he has contracted any debt provable in bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it ;

(e) If he fails to account satisfactorily for any loss of assets or deficiency of assets to meet his liabilities ;

(f) If he has brought on or contributed to his bankruptcy by rash and hazardous speculations, or unjustifiable extravagance in living, or by gambling, or by culpable neglect of business affairs ;

(g) If he has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him ;

(h) If he has within three months preceding the date of the receiving order incurred unjustifiable expense by bringing a frivolous or vexatious action ;

(i) If he has within three months before the date of the receiving order, when unable to pay his debts as they become due, given an undue preference (*e*) to any of his creditors ;

(j) If within three months preceding the receiving order, he incurred liabilities with the view of making his assets equal to 10*s.* in the £ on his unsecured liabilities ;

(*e*) Not necessarily a "fraudulent" preference (*In re Bryant*, [1895] 1 Q. B. 420).

(k) If on any previous occasion he has been adjudged bankrupt, or has made a composition or arrangement with his creditors ;

(l) If he has been guilty of any fraud or fraudulent breach of trust.

If he has committed any misdemeanor under the Bankruptcy Act, 1883 (*f*), or under the Debtors Act, 1869 (*g*), or any other misdemeanor or felony connected with his bankruptcy, the discharge must be refused, unless for special reasons the court otherwise determines.

The effect of discharge (*h*) is to release the bankrupt (but not his partner, or his surety) from every provable debt (*i*), except in the following cases : (i) a debt due on a recognizance (*k*) ; (ii) one occurred for an offence against the revenue (*k*) ; (iii) a debt incurred through fraud, or a fraudulent breach of trust. It will not protect him from criminal proceedings.

The Debtor's Property.

The debtor's property, in the broadest sense of the word, includes everything to which he has a title in possession or remainder, present or contingent. For bankruptcy purposes, it may be classified as property divisible, and property not divisible, amongst his creditors.

(*f*) See s. 31 of the Act.

(*g*) 32 & 33 Vict. c. 62.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30. There are certain liabilities other than those above stated from which the bankrupt is not released by discharge ; for these, see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 10.

(*i*) See *post*, p. 563.

(*k*) Unless the Treasury gives its consent in writing.

Property Divisible (*l*).—(i) All property belonging to the bankrupt at the commencement of the bankruptcy (*m*). (ii) All property acquired by or devolving on him before discharge.

The bankrupt is entitled to deal with after-acquired personal property (including leaseholds) (*n*) as owner unless and until the trustee intervenes to claim it, and if in the meantime the bankrupt disposes or contracts to dispose of it for value to a bonâ fide purchaser, the trustee cannot afterwards claim it (*o*). Knowledge of the bankruptcy on the part of the purchaser is immaterial, and he need not go to the trustee to make inquiries before buying (*o*). The trustee has no right to such part of the bankrupt's personal earnings as is necessary for the support of himself and his family (*p*). But an undischarged bankrupt can give no title to real estate whether equitable or legal (*q*). The distinction thus drawn between real and personal estate appears to rest upon a very unsatisfactory footing (*r*), and undoubtedly leads to much hardship and injustice in cases where a bank-

(*l*) Section 44.

(*m*) *I.e.*, at the date when he committed the earliest act of bankruptcy on which the petition could have been founded (s. 43).

(*n*) *In re Clayton and Barclay's Contract*, [1895] 2 Ch. 212.

(*o*) *Herbert* v. *Sayer* (1844), 5 Q. B. 965; *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262; *Hunt* v. *Fripp*, [1898] 1 Ch. 690. The value given need not augment the bankrupt's estate; a settlement on marriage of after-acquired property will be good (*Re Behrend's Trust*, [1911] 1 Ch. 687).

(*p*) *In re Roberts*, [1900] 1 Q. B. 122.

(*q*) *Re New Land Association and Gray*, [1892] 2 Ch. 138; *Official Receiver* v. *Cooke*, [1896] 2 Ch. 661. After-acquired real estate which undischarged bankrupts purchase as *partners* for partnership purposes must be treated as personal estate, and a good title can be given by conveyance to a purchaser before the intervention of the trustee (*Re Kent County, etc. Gas. Co., Limited*, [1909] 2 Ch. 195).

(*r*) *Per* NEVILLE, J., in *Official Receiver* v. *Cooke*, [1896] 2 Ch., at p. 670.

rupt (possibly under an assumed name) has acquired and sold real estate to a purchaser in good faith.

(iii) The right to exercise all powers in respect of property which the bankrupt might have exercised for his own benefit, except the right of nominating to an ecclesiastical benefice. This would seem to include the right to bring actions both in contract and in tort. The following limits are suggested (*s*): a right of action arising on a tort resulting immediately in injury to the person or feelings of the bankrupt, will not pass to the trustee; nor will a right of action for breach of contract similarly resulting (*e.g.*, to cure, to marry). If the estate is *directly* affected together with the person, perhaps the cause of action will be split, and so much of it as relates to the estate will pass to the trustee (*t*). If a bankrupt has been wrongfully dismissed from his employment after adjudication, the right to sue for damages remains in him and does not vest in his trustee (*u*). It must also be borne in mind that the trustee is, under the bankruptcy laws, only statutory assignee of the bankrupt's choses in action (*uu*), and therefore takes them subject to all equities existing at the date of the commencement of the bankruptcy. He cannot, for instance, obtain priority over a good equitable mortgagee thereof for value merely by giving notice before the mortgagee (*x*).

(iv) All goods being, at the commencement (*y*) of the bankruptcy, in the possession, order, or disposition

(*s*) Williams (9th ed.), pp. 225, 226.
(*t*) *Rose* v. *Buckett*, [1901] 2 K. B. 449.
(*u*) *Bailey* v. *Thurston*, [1903] 1 K. B. 137.
(*uu*) See *ante*, p. 53, note (*f*).
(*x*) *In re Wallis, Ex parte Jenks*, [1902] 1 K. B. 719.
(*y*) See note (*m*), *supra*.

of the bankrupt, *in his trade or business*, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof. Choses in action, other than debts due or growing due to the bankrupt in the course of his trade or business, are not "goods" within this section (*z*). The reputation of ownership may be excluded by a well-known custom, *e.g.*, hotel furniture is not in the reputed ownership of the bankrupt, since it is well known that such furniture is frequently hired (*a*). Where goods are taken by the trustee under this clause, the true owner is entitled to prove for their value (*b*). The section is usually referred to as the "reputed ownership" clause.

Property not divisible (*a*).—(i) Tools of a bankrupt's trade, and the necessary wearing apparel and bedding of himself, his wife and children, to a value, all included, of not more than £20. (ii) Property held on trust for others, if it can be distinguished from the bulk of the bankrupt's own property, *i.e.*, if it is ear-marked (*c*). (iii) The right of presentation to an ecclesiastical benefice. In addition to the above, which are specially mentioned in the Act, we may add (iv). Property which is subject to be divested by the bankruptcy, *e.g.*, an estate given to X. until he becomes a bankrupt, and then to Y.; but such a defeasance is very strictly construed. (v) The benefit of contracts requiring the personal skill of the bankrupt (*e.g.*, to sing); in this case, if the bankrupt elects to perform

(*z*) Section 44 (2) (iii); *In re Parker* (1885), 14 Q. B. D. 636.
(*a*) Section 44 (1), (2).
(*b*) *In re Button*, [1907] 2 K. B. 180.
(*c*) *In re Hallett & Co.*, [1894] 2 Q. B. 237.

the contract, the trustee may enforce it as against the other contracting party.

The following cases should be observed :

The benefit of a clergyman's stipend does not go to the trustee, but it may be sequestrated (*d*). In this event, an amount to be fixed by the bishop must be allowed to the clergyman ; and the curate's stipend for services rendered during four months before the date of the receiving order, to an extent not exceeding £50, is payable in priority in full.

So much of the salary of an officer (*e*) or civil servant of the state is obtainable by the trustee in bankruptcy, as the court may direct, but the written consent of the chief officer of the department must be obtained before the order can come into force.

Where a bankrupt is in receipt of a salary or income, *i.e.*, of some income payable at a fixed time, or is entitled to half pay or pension, the court may make an order that such salary or part of it be paid to the trustee (*f*).

Discovery of the Debtor's Property (*g*).—After a receiving order has been made, the court may, on the application of the official receiver or the trustee, order any of the following to come before it and be examined on oath concerning the debtor, his dealings, or property : the debtor, his wife, anybody suspected of having in his possession property of the debtor, or of being indebted to him ; anybody suspected of being

(*d*) Section 52. (*e*) Section 53.

(*f*) As to the meaning of salary or income, see *Re Shine*, [1892] 1 Q. B. 522 ; *Re Graydon*, [1896] 1 Q. B. 417.

(*g*) Section 27.

acquainted with the debtor's affairs. These persons may be required to produce any relevant documents in their custody or power. If any person on examination admits that he is indebted to the debtor or in possession of property belonging to him, an immediate order may be made for payment of the debt or delivery up of the property.

Ownership of the Property.—From the date of the adjudication and until the appointment of a trustee, and during any vacancy in the trusteeship, the official receiver is trustee for the purposes of the Act. The trustee when appointed takes the property, and when there are resignations and new appointments it passes from trustee to trustee. No conveyance is necessary; the certificate of appointment (*h*) is sufficient evidence of ownership.

DEBTOR'S DUTIES.

(1) He must prepare a *statement of affairs* (*i*) which will give full particulars as to his assets, debts, creditors, securities held by them, etc. This must be verified by affidavit, and must be made within three or seven days after the receiving order, according to whether the petition was presented by himself or by his creditors (*k*). If necessary, the official receiver wil allow him skilled assistance in the preparation of this statement. (2) He may be required by the court to file a profit and loss and a cash account showing his disbursements and receipts for any period; the official receiver may order him to do the same for the period

(*h*) See *post*, p. 550. (*i*) Section 16.
(*k*) This time may be extended by the official receiver (r. 218).

of two years immediately preceding the date of the receiving order or less (*l*). (3) He must be present at meetings or at special appointments, and must submit to any examination, and must give full information. (4) He must give an inventory of his property, and, if adjudged bankrupt, aid to the uttermost in its discovery, realisation, and distribution (*m*). This he must do even after discharge, and, if the discharge is subject to a judgment or to any other condition as to his future earnings or after-acquired property, he must file annually a statement of his income, and give full information with relation to it (*n*).

THIRD PARTIES, AND THE DEBTOR'S PROPERTY.

Sometimes it happens that there is a competition between the interests of a third party—*i.e.*, a person other than the debtor or the trustee—and the estate. The cases below mentioned are important.

(a) *Execution Creditors* (*o*).—When execution has issued against the land, goods, or debts of the bankrupt, the creditor retains the fruits of his diligence only if execution is complete by the seizure and sale of the goods, or seizure or appointment of a receiver over the land, or the receipt of the debt, and this before the date of the receiving order and before the creditor has notice of any act of bankruptcy which has been committed within three months before the petition. But even then the creditor is not absolutely safe.

(*l*) Rule 338.

(*m*) Section 24.

(*n*) Rule 244.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 45, 46, and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), ss. 11, 12.

Where goods are seized, if the amount of the levy exceeds £20, the sheriff must deduct the expenses of execution, and retain the balance of the proceeds of the sale or of money paid to avoid it (*p*), for fourteen days; if during that time he receives notice of a bankruptcy *petition*, on which a receiving order is eventually made, he must hand over the money to the trustee, otherwise the creditor gets it. If, previous to sale, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, he must hand over the goods, and any money received in part satisfaction, to the trustee or official receiver on request. But a bonâ fide purchaser at a sale by a sheriff does not fail to acquire a good title against the trustee.

(b) *Avoidance of Voluntary Settlements* (*q*).—If a voluntary settlement is not fraudulent and more than ten years have elapsed from the making of it, it is unimpeachable. If less than ten years but more than two have elapsed, the settlement is voidable (*r*) by the trustee, unless those claiming under it show (i) that the settlor was solvent at the making of the settlement without the aid of the property comprised in it; and (ii) that the interest of the settlor passed to the trustee

(*p*) The sale must be public (s. 145), unless the court otherwise orders.

(*q*) Section 47. The word "settlement" includes a conveyance of property, and, indeed, any disposition, verbal or not, which is in the nature of a settlement (*Re Vansittart*, [1893] 1 Q. B. 181). This section does not apply to the administration of the estates of deceased insolvents (*In re Gould* (1887), 19 Q. B. D. 92).

(*r*) *Re Brall*, [1893] 2 Q. B. 381; approved *In re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776.

of the settlement on the execution thereof. If it was executed within two years of the commencement of the bankruptcy (*s*) it is void (*t*) as against the creditors. A gift of personal property—*e.g.*, jewellery—will be a settlement within this section, if although there is no restriction on the donee's power of alienation, yet the intention was that the donee should use or retain the property for an indefinite time (*u*).

(c) The following settlements are excepted from the operation of s. 47, viz.: (1) a settlement made before and in consideration of marriage; (2) a settlement made in favour of a bonâ fide purchaser or incumbrancer for value; or (3) a post-nuptial settlement on a wife or children of property which has accrued to the settlor in his wife's right. Agreements to settle on marriage are void as against the trustee in bankruptcy, unless the money or property to be settled has, as a fact, been paid or transferred to the trustee of the settlement before the bankruptcy; or unless the property accrues in right of the wife (*x*).

(d) *Fraudulent Preferences* (*y*).—If a person unable to pay his debts as they become due, within three months before the presentation of a bankruptcy petition upon which he is adjudged bankrupt, with a *view to prefer* a creditor, transfers property to that creditor, pays the debt, or allows his property to be taken for the debt, he has made a fraudulent preference,

(*s*) *Re Reis*, [1904] 1 K. B. 451. Reversed on another point by the House of Lords, *sub nom. Clough* v. *Samuel*, [1905] A. C. 442.

(*t*) Or rather, voidable (*Re Brall*, *supra*).

(*u*) *Re Tankard*, [1899] 2 Q. B. 57.

(*x*) Section 47 (2).

(*y*) Section 48.

which is void against the trustee in bankruptcy, to whom the creditor must return the property or money. The word "preference" implies an act of free will, and therefore any facts showing that the advantage given to the creditor was not voluntary will be entitled to great weight. Thus, pressure by the creditor, especially where it involves a threat of legal proceedings, has been held to negative a fraudulent preference (*z*). A mistaken apprehension that legal proceedings would be taken has been held sufficient for this purpose (*a*). So also if the debtor's object was to shield himself against the possibility of criminal proceedings for breach of trust (*b*). And even a desire upon the debtor's part to repair a wrong that he has committed (*e.g.*, a breach of trust), though the breach was at the time only known to himself, has been treated as warranting the conclusion that there was no preference (*c*). But the rights of a third person who for value and bonâ fide has obtained the bankrupt's property from such creditor, are not to be affected.

(e) *Mortgagees.*—These are secured creditors, and may realise for their own benefit (*d*). As to mortgages of personal property, see under "BILLS OF SALE" (*e*). If the security is on real estate the creditor may apply to the court, and an order may be made for a sale, accounts, and inquiries. The trustee will get the conduct of the sale where the security is sufficient (*f*),

(*z*) *Ex parte Taylor* (1887), 18 Q. B. D. 295.
(*a*) *Thompson* v. *Freeman* (1786), 1 T. R. 155.
(*b*) *Sharp* v. *Jackson*, [1899] A. C. 415.
(*c*) *In re Lake*, [1901] 1 Q. B. 710.
(*d*) *Post*, pp. 562, 563. (*e*) *Ante*, pp. 460 *et seq.*
(*f*) *In re Jordan* (1884), 13 Q. B. D. 228.

and the money resulting will go to pay expenses, then to pay the mortgagees, the remainder falling into the general estate. If there is not enough for the mortgagees, they can prove against the estate for the deficit.

(f) *Persons Injured by Disclaimer* (*g*). — If they have an interest in the property, they may apply to the court, and get an order vesting it in themselves. If the person is an underlessee or a mortgagee by demise of a lease, the order will make the person taking it subject to the bankrupt's liabilities in connection with the property, or if in the particular case the court thinks fit, subject to the liabilities of an assignee of the bankrupt's interest therein (*h*). If the underlessee or mortgagee declines to take a vesting order upon the terms offered by the court, he will be excluded from all interest in the property (*i*). In any case, a loss caused by disclaimer is a provable debt in bankruptcy (*k*).

(g) *Contracts.*—Any person under a contract with a bankrupt may apply to the court for rescission, and an order will be made if in the opinion of the court a fit case is made out. Damages may be awarded to either party, and the creditor may prove against the estate for these (*l*).

Protected Transactions.—Subject to the provisions above mentioned as to the effect of bankruptcy on

(*g*) See *post*, p. 554.

(*h*) Bankruptcy Act, 1890, s. 13 ; and see *In re Carter and Ellis*, [1905] 1 K. B. 735.

(*i*) Section 55 (6).

(*k*) Section 55 (7).

(*l*) Section 55 (5).

executions, settlements and preferences, any payment by, or to the bankrupt, and any conveyance by or contract with him for valuable consideration will hold good, provided the transaction takes place before the date of the receiving order, and before any notice to the person dealing with the bankrupt of any "available act of bankruptcy" (*m*). But even if a contract has been entered into before the receiving order and without notice of any act of bankruptcy, no payment or conveyance under it after notice of an act of bankruptcy would be protected (*n*). The nature and limits of the protection afforded by the section are well illustrated by *Ponsford & Co.* v. *Union of London and Smith's Bank* (*o*), which seems to establish the following propositions, viz.: (1) A person who has committed an available act of bankruptcy cannot give a good discharge to a debtor who pays him with notice, even if an action has been commenced to enforce payment. (2) In the same circumstances a secured creditor cannot safely receive payment of the debt, and his refusal to accept a tender of payment does not deprive him of any right to interest or to realise the securities before actual repayment. (3) The creditor's right to sue is not affected by the fact that he has committed an available act of bankruptcy, but money will be directed to be kept in court or the court will otherwise safeguard the rights of any trustee in bankruptcy, giving the defendant the costs of the action, if he has acted properly.

(*m*) Section 49.

(*n*) *Powell* v. *Marshall*, [1899] 1 Q. B. 710.

(*o*) [1906] 2 Ch. 444.

If a purchaser from the bankrupt has paid for property without notice of any act of bankruptcy, the trustee can be called upon to perform the contract (*p*). A past debt may be good consideration for a conveyance by the bankrupt, but if a creditor takes over substantially the whole of a debtor's property in satisfaction of a past debt, knowing that there are other creditors, the transaction will not be protected (*q*).

The Debtor's Person.

The Debtors Act of 1869 abolished imprisonment for debt, except in certain cases specified therein (*r*) ; but under the law of bankruptcy the court may order arrest of the debtor and seizure of his books and papers, if a bankruptcy notice has been issued and served (*s*), or if a petition has been filed, and if there is reason to suspect that the debtor is about to abscond, with the view of avoiding payment, or of avoiding service of or appearance to any petition, or of avoiding examination as to his affairs, or of otherwise avoiding, embarrassing, or delaying bankruptcy proceedings against him (*t*).

He may also be arrested if, after service upon him of a bankruptcy petition, there is probable ground for believing that he intends to remove, conceal, or destroy his papers or property (*u*) ; or if after such service he

(*p*) *Ex parte Holthausen* (1874), L. R. 9 Ch. 722.
(*q*) *In re Jukes*, [1902] 2 K. B. 58.
(*r*) See the Act 32 & 33 Vict. c. 62, ss. 4, 5.
(*s*) Section 25 (2) ; service at the time of his arrest will do.
(*t*) Section 25 (1) (a).
(*u*) Section 25 (1) (b).

removes any goods above the value of £5, without the permission of the trustee or of the official receiver (*x*); or if he fails without due cause to attend any examination ordered by the court (*y*).

OFFICERS.

The administration of the estates of bankrupts is now under the control of the court and Board of Trade, and under these there are several classes of officers; *e.g.*, official receivers, trustees, special managers.

The Official Receiver.

He is appointed by the Board of Trade to receive all the bankrupt's property until the appointment of a trustee. It is not usual to nominate a separate receiver for each estate, the practice being to appoint a receiver, who acts in all bankruptcies within a given district. The Board of Trade may at any time appoint a deputy or a temporary receiver, and it has power to remove any person whom it has appointed (*z*).

His duties are, (i) with regard to the debtor's conduct, to report thereon, whether anything has occurred which should guide the court as to making an order on the debtor's application for discharge. He should take part in the public examination, etc. (*a*); (ii) as regards the property, he must see that the proper statement of affairs is made, He must act as trustee (*b*) until a trustee is appointed; he must summon and

(*x*) Section 25 (1) (c).
(*y*) Section 25 (1) (d).
(*z*) Sections 66, 67.
(*a*) Section 69.
(*b*) And as such can sell the property (*Ex parte Turquand* (1886) 11 App. Cas. 286).

preside at the first meeting of creditors, and must issue forms of proxy ; he may appoint a special manager, and may remove him ; he must insert the proper advertisements, and he must report to the creditors on any proposal made by the debtor (*c*). His powers as receiver are such as are possessed by a receiver and manager appointed by the High Court.

Special Managers (*d*).

A special manager is a person whose duty it is to manage the business until a trustee is appointed. The appointment is made by the official receiver if he is satisfied that the nature of the bankrupt's business requires it and if asked to do so by any creditor. Such manager must give security to the satisfaction of the Board of Trade, and he may receive remuneration at such rate as the creditors by ordinary resolution may fix, or in default of this as the Board of Trade may determine. His powers are such as are entrusted to him by the official receiver upon the occasion of his appointment.

The Trustee.

Appointment.—He may be appointed (1) by the creditors by ordinary resolution (*e*) at any of their meetings (*f*), after the debtor has been adjudged bankrupt, or the creditors have resolved that he be so ;

(*c*) Section 70, and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3.

(*d*) Section 12.

(*e*) *I.e.*, a majority in value of those present, and voting either in person or by proxy.

(*f*) Section 21 (1).

(2) by the committee of inspection (*g*) when the circumstances are as above, and the creditors decide to leave the choice to that body ; (3) by the Board of Trade, if the creditors do not appoint within four weeks of the adjudication, or within seven days of the failure of proceedings relating to a composition, or within three weeks of a vacancy. But the trustee chosen by the Board ceases to hold office if the creditors subsequently take a trustee of their own choosing (*h*).

The official receiver must not be trustee except in the following cases (*i*) : (i) Where there is a vacancy in the trusteeship, then he acts until a new trustee is appointed (*k*) ; (ii) where the value of the estate is under £300 (*l*) ; (iii) where the estate is that of a deceased insolvent (*m*) ; (iv) where he is appointed by the Board of Trade in default of an appointment by the creditors.

The appointment is not complete until the Board of Trade has given a certificate of appointment (*n*), and this is not obtained until the trustee has given security for the due performance of his duties (*o*).

The security must be given to some person appointed by the Board of Trade, which fixes the amount and nature of such security, and may from time to time increase or diminish the amount (*p*).

When it has been given the certificate of appointment will, unless there is ground for objecting to the trustee, be granted, and from then the appointment

(*g*) *Post*, p. 553, and s. 21 (1).
(*h*) Section 21 (6), (7) ; s. 87.
(*i*) Section 21 (5).
(*k*) Sections 54, 70 (1) (g), 87.
(*l*) Section 121 (1).
(*m*) Section 125 (5).
(*n*) Section 21 (2), (4).
(*o*) Section 21 (2).
(*p*) Rule 342.

dates (*q*) ; the certificate is conclusive evidence of the appointment (*r*). The Board may refuse the certificate if (i) the trustee was not elected bonâ fide ; (ii) if he is unfit to act, *e.g.*, if he has in any previous case been removed for misconduct (*s*) ; (iii) if his connection with the bankrupt or his estate, or any creditor, makes it difficult for him to be impartial (*t*). If the certificate is refused the Board must, on the demand of a majority in value of creditors, signify the fact and the grounds thereof to the High Court, and the validity of the refusal may be then tried (*u*).

The appointment must be advertised in the London Gazette and in a local paper ; the cost is payable by the trustee, who, however, may recoup himself out of the estate (*x*).

Any number of trustees may be appointed (*y*), but it is usual to select one person only, who may be a creditor or not, as may seem best.

Determination of the Appointment.—The trustee will cease to be such in the four following cases :

(1) If he resigns. He should call a meeting of the creditors, and give seven days' notice to the official receiver (*z*). The meeting has power to accept or refuse the resignation.

(2) If he is removed. This may be at the instance of the creditors ; to obtain the removal, a meeting, of which seven days' notice should be given, must, at the

(*q*) Section 21 (4).
(*r*) Rule 138.
(*s*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 4.
(*t*) Section 21 (2).
(*u*) Section 21 (3).
(*x*) Rule 298.
(*y*) Section 84.
(*z*) Rule 304.

request of one-fourth in value of the creditors, be specially called by a member of the committee of inspection, or by the official receiver (on a deposit of costs), and an ordinary resolution in favour of removal must be carried. The Board of Trade also has power to remove a trustee if he misconducts himself, or if he fails to keep up his security, or if by reason of lunacy, continued sickness, or absence he is incapable of performing his duties, or if through his connection with the bankrupt, the bankrupt's estate or a particular creditor, it would be difficult for him to act impartially, or if he has in any other matter been removed for misconduct (*a*): but the creditors may then carry a resolution in his favour to the contrary, and appeal to the court.

(3) If he has become *functus officio*, *e.g.*, when a scheme is adopted, or when the estate has been fully wound up.

(4) If a receiving order in bankruptcy has been made against him (*b*).

(5) If he has been released, without having previously resigned or been removed (*c*).

When the estate has been fully realised, or on resignation, or removal, a trustee may, if he wishes, apply for his *release*. This is granted by the Board after a proper investigation has been made into his accounts, and after due notice has been given to the debtor and creditors. Its effect is to free the trustee with regard to all matters done during his trusteeship in his official

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 86; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 19, and Rules 301—303.

(*b*) Section 85.

(*c*) Section 82. See Rule 309.

capacity; but it is revocable on proof of fraud or of material concealment (*cc*).

The Committee of Inspection.—It will be convenient here to state the nature and functions of this body. It is a committee, consisting of from three to five persons, appointed by the creditors at the first or a subsequent meeting (*d*) from amongst the creditors or those who hold general proxies or powers of attorney from such creditors. Its duty is to supervise the trustee, and to superintend the general administration of the estate. It may act by a majority of the members present at a meeting, and a majority of its members forms a quorum (*e*). A member ceases to be such when (i) he retires by delivery of written notice to the trustee (*f*); (ii) if he become bankrupt or compound with his creditors (*g*); (iii) if he is removed by resolution carried at a special meeting, seven days' notice of intention to hold which has been given (*h*); (iv) if he be absent from five consecutive meetings (*g*).

It is not necessary that a committee should be appointed, and in its absence the Board of Trade will give any proper consent to acts which the trustee cannot of his own power perform (*i*).

Duties of a Trustee.—Generally, the trustee's duty is to realise the estate to the best advantage, and to distribute it as quickly as possible; to have regard to the resolutions of the creditors, and to the orders of the

(*cc*) Section 82. Rule 309.

(*d*) Section 22 (1). Creditors may not vote till they have proved their debts (Bankruptcy Act, 1890, s. 5).

(*e*) Section 22 (2), (3).

(*f*) Section 22 (4).

(*g*) Section 22 (5).

(*h*) Section 22 (6).

(*i*) Section 22 (9).

Board of Trade ; and to make no profit in any way except what may be specially allowed him as remuneration.

Duties as to the Bankrupt's Property.—He must not directly or indirectly purchase the estate, nor may he make a profit out of it. He must collect debts, take possession of the estate, real and personal, and with the permission of the committee of inspection he may carry on the business, with a view to its better realisation. He may, and where necessary should, transfer choses in action, stock, and indeed any property of the debtor (*k*).

Disclaimer (*l*).—This is the formal notification by the trustee of his refusal to accept the ownership of onerous property. With regard to any property consisting of land burdened with onerous covenants, onerous contracts, shares or stock in companies, or of any other property unsaleable or saleable only with difficulty owing to its burdens, the trustee may disclaim the property ; but (i) the disclaimer must be in writing and signed by the trustee ; (ii) it must take place within twelve months of his appointment ; or, if he has no knowledge of the property within a month of his appointment, then within twelve months of his acquiring the knowledge (*m*) ; (iii) if the property consists of leaseholds he must obtain leave of the court, unless the property has not been sublet or mortgaged ; and either (i) its value is under £20 per annum ; or (ii) the estate is being administered summarily ; or (iii) the

(*k*) Sections 50, 57. (*l*) Section 55.
(*m*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13.

lessor does not bring the matter before the court within seven days of his being served with notice of the trustee's intention to disclaim. If the property has been sublet or mortgaged he must apply to the court for leave to disclaim, unless notice having been served on the lessor, mortgagee, and sub-lessee, none of them within fourteen days require the matter to be brought before the court (*n*).

A person interested may make written application to the trustee, requiring him to decide whether he will disclaim or not, and in the event of no disclaimer within twenty-eight days the right is gone, and the trustee may in consequence become personally liable in respect of the property (*o*).

The effect of the disclaimer is to release the bankrupt and the estate from any liability in respect of the property from the date of the disclaimer, and to release the trustee absolutely, notwithstanding previous acts of ownership (*p*); but those who are injured have certain rights (*q*).

A trustee is bound to specifically perform a contract for the sale of real estate for valuable consideration to the same extent as the bankrupt could have been compelled to carry it out (*r*). He cannot disclaim the contract so as to defeat the equitable interest vested in the purchaser under the contract (*s*).

Powers of the Trustee (*t*).—He may (1) sell all or any of the bankrupt's property by public or private

(*n*) Section 55 (3), and r. 320.
(*o*) Section 55 (4).
(*p*) Section 55 (2).
(*q*) See *ante*, p. 545.
(*r*) *Ex parte Holthausen* (1874), L. R. 9 Ch. 722.
(*s*) *In re Bastable*, [1901] 2 K. B. 518.
(*t*) Sections 50, 56, 57.

sale, and may transfer the portions sold to the purchaser ; (2) give receipts which effectually discharge the person paying ; (3) prove for and draw dividends to which the bankrupt is entitled ; (4) exercise any power given him by the Act, and execute instruments necessary for carrying it out ; (5) deal with property to which the bankrupt is tenant-in-tail, just as could the bankrupt himself.

With the permission of the committee of inspection, he may exercise more extended powers ; viz., he may (1) carry on the business, so far as is necessary for the winding up of the estate ; (2) bring or defend any legal proceeding relating to the property ; (3) employ any solicitor or agent to do any particular act, but he cannot give a retainer to act generally in all matters ; (4) agree to accept a future payment for property sold, subject to such security as the committee may think fit to take ; (5) mortgage or pledge the property to raise money for the payment of debts ; (6) compromise claims, whether by or against the bankrupt, and refer disputes to arbitration ; (7) divide in its existing form amongst creditors such property as from its nature is not readily or advantageously capable of sale.

In no case must the permission be general ; it is requisite for each particular act desired to be done ; and in every case the wishes of the general body of creditors must be regarded, when such wish is properly and regularly expressed (*u*). It must be remembered that the assistance of the court may always be invoked against a trustee who is exceeding his powers, or who is exercising them improperly.

(*u*) Section 89.

The Trustee's Accounts.—These must be kept in the prescribed manner, and all money received and spent must be accounted for.

Money received must not be retained by the trustee, nor paid into a private account (*x*); and if he retains for more than ten days a sum exceeding £50 without the authority of the Board of Trade, he makes himself liable to severe penalties (*z*). It should be paid into the Bank of England (Bankruptcy Estates Account), and a receipt should be taken by the trustee. In some cases money may be left at a local bank. Thus, when a debtor has an account at any bank, it is usually kept open for seven days after the first meeting; and the general funds of the estate may be paid into and out of a local bank, if the trustee, on the application of the committee of inspection, gets permission from the Board of Trade. All moneys received should be at once paid into this account; money should be taken out by cheque, containing the name of the estate on the face, and signed by the trustee, by one member of the committee, and, if thought desirable, by one other person specially appointed (*a*). Money is obtained out of the Bankruptcy Estates Account by cheques drawn by the Board of Trade at the trustee's request.

Trustee's Books.—He must keep (1) a record book. This will contain an account of all proceedings and information necessary to furnish a correct view of the administration, *e.g.*, resolutions of creditors. (2) A cash book. This must contain the receipts and payments as made from day to day, except those falling

(*x*) Section 75.
(*z*) Section 74 (6).
(*a*) Section 74 and r. 340.

under the next head. (3) A trading account book. This only if the trustee is trading for the estate; it must contain an account of receipts and payments, of which the total weekly amount must be incorporated in the cash book; once in each month it should be verified by affidavit, and be certified by the committee of inspection, or by some member thereof deputed to do it by such committee (*b*).

Audit of Accounts (*c*).—The accounts are audited by two separate bodies, by the committee of inspection, and by the Board of Trade. The committee must see all books and vouchers at least once in every three months, but it may require them at any time; at the close of each audit, it must give a certificate in accordance with Form 128 of the Bankruptcy Rules, 1886 and 1890. The Board of Trade inspects and audits the accounts every six months, and to enable this to be done, the trustee must send in the vouchers, the certificates of the committee, and a duplicate of the cash book; the audited copy is returned to the registrar of the court having jurisdiction, and is by him filed (*d*). If the trustee has received nothing and made no payments since the last audit, he must send to the Board of Trade an affidavit to that effect (*e*).

When he sends his first account, he must further enclose a copy of the debtor's statement of affairs, marking the amounts realised in red, and explaining the non-realisation of the remaining assets. When property is sold through an auctioneer or other agent,

(*b*) Rule 308.
(*c*) Rules 288, 289.
(*d*) Rule 290.
(*e*) Rule 291.

the gross amount obtained must be entered, the expenses being allowed on the other side (*f*).

Trustee's Remuneration.—This is settled by the creditors, or by the committee of inspection, if the creditors so resolve. In three cases the Board of Trade will fix the amount, viz., when a fourth in value or number of the creditors dissent from the amount fixed by the others, when the bankrupt satisfies the Board that the remuneration given is unreasonably large (*g*), or when the trustee was appointed by the Board of Trade.

The payment must take the form of a percentage partly on the amount realised *by the trustee* (*h*), partly on the amount distributed in dividend (*i*). The expenses are allowed separately, unless the resolution states that the remuneration is to cover them ; if the trustee receives no remuneration, reasonable expenses may be allowed, to be fixed by the creditors, with the sanction of the Board of Trade (*k*).

DISTRIBUTION OF THE PROPERTY.

Generally speaking, a trustee's duty under this head is to pay expenses and preferential debts, then to retain a certain amount for contingencies, and distribute what is left as quickly as possible.

Costs and Charges (*l*).—These are payable in a certain order, each being entitled to payment in full in the

(*f*) Rule 295.
(*g*) Section 72 (1), (2).
(*h*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 15 (1).
(*i*) Section 72 (1) ; r. 305.
(*k*) Bankruptcy Act, 1890, s. 15 (2).
(*l*) Rules 125, 125A.

order in which they come. Amongst the more ordinary expenses, grouped as they are entitled to payment, are: (1) actual expenses of the official receiver incurred in protecting the assets of the debtor, or incurred by him or by his authority in carrying on the business, including the costs of shorthand notes taken at the instance of the official receiver; (2) his fees and costs; (3) the petitioning creditor's deposit; (4) the remuneration of the special manager (if any); (5) his taxed costs; (6) allowance made to the debtor by the official receiver; (7) trustee's disbursements; (8) allowance to the debtor by the trustee (*m*); (9) trustee's remuneration; (10) necessary out-of-pocket expenses of the committee of inspection subject to the approval of the Board of Trade.

Preferential Debts.—The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), provides for the payment in priority of certain debts, to which have been added sums payable by way of compensation to a workman as provided by s. 5 (3) of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58). The provisions of the above Acts are similar to those contained in s. 209 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and this subject has already been dealt with in treating of the winding up of companies (*n*), but in bankruptcy the periods of time must be calculated with reference to the date of the receiving order.

The Act (*nn*) also applies in the case of a deceased person dying insolvent, the date of his death being

(*m*) This must, in the absence of a special resolution of the creditors, be a money allowance (r. 296).

(*n*) *Ante*, pp. 231, 232.

(*nn*) 51 & 52 Vict. c. 62, s. 1 (6).

substituted for the date of the receiving order, but the priority given by s. 125 of the Bankruptcy Act, 1883, to the payment of funeral and testamentary expenses is not affected (*o*).

An apprentice or articled clerk, who has paid a fee to the master, may, on the latter's bankruptcy, obtain a return of money, varying in amount, according to the time which has elapsed since he entered the service; or the trustee may, with the apprentice's consent, transfer the indenture of apprenticeship or articles of agreement to some other person (*p*).

By the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35, a registered society has a preferential right as regards any claims for money or property *virtute officii* in the hands of any of its officers, if such officer becomes bankrupt. The right remains, although the moneys cannot be traced and are no longer in the officer's possession (*q*), and although he ceased to be such officer before his bankruptcy (*r*). Such a debt must be paid in priority to all the other debts of the bankrupt, including those enumerated in the Preferential Payments in Bankruptcy Act, 1888.

Depositors in savings banks are secured against loss by the acts or misconduct of any officer employed by a similar preferential right in the event of such officer becoming bankrupt (*s*).

The court will not approve a composition or scheme

(*o*) 51 & 52 Vict. c. 62, s. 2.

(*p*) Section 41.

(*q*) *Re Miller*, [1893] 1 Q. B. 327.

(*r*) *Re Eilbeck*, [1910] 1 K. B. 136.

(*s*) Savings Bank Act, 1863 (26 & 27 Vict. c. 87), s. 14; Savings Bank Act, 1891 (54 & 55 Vict. c. 21), s. 13.

which does not provide for payment in priority of all the above-mentioned debts (*ss*).

With the exception of the above and of certain deferred debts hereinafter referred to (*post*, p. 565), all debts proved in the bankruptcy are paid *pari passu* (*t*).

The Landlord.—The landlord is in a peculiar position as regards his rent. He has no priority over other creditors, unless he has distrained. If he distrains before the commencement of the bankruptcy his distress will hold good for the whole rent. If he distrains within three months before the receiving order, he must pay the preferential creditors out of the proceeds of the distress; if he suffers loss thereby, he becomes a preferential creditor himself for the amount of the loss (*u*), but as against other creditors he can distrain for all due to him. If he distrains after the commencement of the bankruptcy, he can do so only for six months' rent accrued prior to the adjudication; and where the landlord does not recover the full rent due to him by distress, he may prove for the balance as an ordinary creditor (*x*). If the trustee remains in possession without disclaiming, the landlord may distrain for rent accrued due after adjudication in the ordinary way (*y*).

Secured Creditors.—A secured creditor is a person holding a mortgage, charge or lien on the property of the debtor, as security for a debt due to him from the

(*ss*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (18).

(*t*) Bankruptcy Act, 1883, s. 40 (4). Interest from the date of the receiving order at the rate of £4 per centum per annum is payable on all debts proved (*ibid.*, s. 40 (5)).

(*u*) 51 & 52 Vict. c. 62, s. 1 (4).

(*x*) Bankruptcy Act, 1883, s. 42; Bankruptcy Act, 1890, s. 28.

(*y*) *Ex parte Hale* (1875), 1 Ch. D. 285.

debtor. He has three courses open to him (*z*), viz.: he may (1) surrender his security and prove for his entire debt; (2) he may realise it, and prove for any deficit after deducting the net amount realised; (3) he may state the particulars in his proof, assess its value, and prove for a dividend on the deficit; but in this case the trustee may redeem the security at the assessed value (*a*). If the trustee does not redeem, the creditor may require him in writing to elect whether he will do so or no, and the trustee must then, if he wishes to redeem, do so within six months. If the trustee is dissatisfied with the valuation, he may demand a sale of the security, on such terms as he and the creditor may agree or the court may fix; the creditor may, with leave of the court, amend, if he can prove that he made a bonâ fide mistake, or that the security has altered in value since he put in his proof. Where the secured creditor is also the petitioning creditor, the trustee is not entitled to redeem the security at the value placed upon it in the petition. The right to redeem only arises where the value has been estimated for the purposes of proving (*b*).

Proofs.—A creditor may prove for all liabilities, present, future, or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the said date (*c*); *e.g.*, in *Hardy* v. *Fothergill* (*d*), it was decided that a claim

(*z*) Bankruptcy Act, 1883, Sched. II., rr. 9 *et seq.*

(*a*) *Cf.* the trustee's power of redeeming when the creditor claims to vote at a meeting, *ante*, p. 530.

(*b*) *In re Vautin*, [1899] 2 Q. B. 549.

(*c*) Section 37 (3). (*d*) (1888), 13 App. Cas. 351.

could be made for non-performance of a covenant to leave in repair, the lease not yet having expired. A contingent claim must be estimated by the trustee, subject to appeal to the court; if no estimate is possible, the court may, on application, declare the debt not provable (*e*).

If there have been mutual debts, mutual credits, or mutual dealings between the bankrupt and the creditor, an account must be taken between them and a balance struck, provided that the creditor had no notice of an available act of bankruptcy at the time he gave credit to the debtor (*f*). The line of set-off must be drawn at the date of the receiving order, unless the creditor's right of set-off has been stopped at an earlier date by notice of an act of bankruptcy (*g*). Where the bankrupt owed a creditor an ascertained sum, and before the receiving order the latter had incurred an obligation which ultimately (long after adjudication) ripened into a debt, it was held that, on a demand by the trustee of the sum due, the creditor could set off the debt due from the bankrupt (*g*). So a creditor, who has contracted to buy land from the bankrupt and who is entitled to specific performance by the trustee, may set off his debt against the purchase money (*h*).

The following are not provable (*i*): demands in the nature of unliquidated damages not arising from a contract, promise, or breach of trust; debts contracted

(*e*) Section 37 (4)—(7).

(*f*) Section 38. As to unliquidated claims, see *Jack* v. *Kipping* (1882), 9 Q. B. D. 113.

(*g*) *In re Daintrey*, [1900] 1 Q. B. 546.

(*h*) *In re Taylor*, [1910] 1 K. B. 562.

(*i*) Section 37 (1), (2).

by the debtor after knowledge by the creditor of an act of bankruptcy; debts contracted after receiving order.

The following proofs are allowed, but dividends on them will be deferred until other creditors have been paid in full; (i) proof for debt at agreed interest exceeding 5 per cent., so far as concerns the interest in excess of 5 per cent. (*k*); (ii) certain debts within the third section of the Partnership Act, 1890, see *ante*, p. 164; (iii) proof for money lent by a wife to a husband for use in his trade or business (*l*).

A proof should be made as soon as may be (*m*) after the making of the receiving order, and should be sent to the trustee (or official receiver), verified by affidavit; all particulars must be given, and vouchers necessary to substantiate the claim should be specified, and may be called for by the trustee (*n*).

When the proof is sent in, the trustee must, within twenty-eight days (*o*), admit it, reject it, or require further evidence, and unless he admits it must send written notice of his decision, with the grounds thereof, to the creditor (*p*). The court has full power to review the decision, and may expunge or reduce a proof admitted by the trustee, even on the application of the trustee himself (*q*). When a dividend is about to be

(*k*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 23. In a scheme of arrangement the application of this section may be excluded (*In re Nepean*, [1903] 1 K. B. 794).

(*l*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3.

(*m*) To enable a creditor to vote at a meeting, he must send his proof within the time specified in the notice convening the meeting, not later than mid-day preceding the date of the meeting (r. 222).

(*n*) Schedule II., rr. 3, 4.

(*o*) Rule 228.

(*p*) Schedule II., r. 22.

(*q*) Schedule II., rr. 23—25.

declared, the trustee must, within seven days of a specified date, admit or reject the proof, and send written notice thereof to the creditor, who in case of rejection has seven days in which to give notice of appeal (*r*).

Interest.—Interest on overdue debts (although not agreed for) may in certain cases be included in the proof (*s*).

Dividends (*t*).—These are payable to all who have proved, the amount depending upon what remains of the estate after payment of the expenses and the preferential debts. There may be one or more dividends, according as may be found convenient, and the time for declaration, though fixed by the rules, may be varied to suit the circumstances (*u*). Due notice must be given to the creditors and to the Board of Trade, and the intention to distribute must be announced in the Gazette. As to further procedure, see the Bankruptcy Rules, 1886 and 1890, 232 *et seq.*

COMPOSITIONS AND ARRANGEMENTS.

A debtor may obtain his release by the acceptance of a composition or the adoption of a scheme of arrangement; *e.g.*, the creditors may agree to take 10*s.* in the £ payable by instalments and guaranteed by satisfactory persons. This may take place even after adjudication in bankruptcy (*x*); but as a rule it precedes this, and is consented to at a specially called meeting, which may

(*r*) Rules 228, 232 (2).
(*s*) Schedule II., r. 20.
(*t*) See rr. 232, 234
(*u*) Rule 232 (5).
(*x*) Section 23.

be the first meeting. The procedure is as follows (*y*): The debtor must submit to the official receiver in writing his proposals as soon as may be after the receiving order (*z*), and the official receiver must then call a meeting of creditors, accompanying his notice with a report on the scheme; the meeting must be held before the conclusion of the public examination. If accepted at this by a majority in number, and three-fourths in value of those who have proved, the sanction of the court must then be obtained to the scheme, but not till after the public examination is concluded (*a*). The court cannot assent to the scheme unless it considers the proposals reasonable, and calculated to benefit the general body of the creditors. And if the court would be bound to refuse the bankrupt his discharge, it must refuse its consent to a scheme. Further, if any of the offences disentitling a bankrupt to an immediate discharge are proved (*b*), the court's power to approve the arrangement is gone, unless the scheme provides reasonable security for a dividend of at least 7*s.* 6*d.* in the £ on all the unsecured debts provable against the debtor's estate; *i.e.*, provable at the time when the scheme comes up for approval. So that if any creditors have released their debts, those debts can be disregarded (*c*). It is no ground of objection to a scheme that a withdrawing creditor has released his debt upon

(*y*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3.

(*z*) Usually within four days after the specified time for lodging the statement of affairs.

(*a*) The desire of the creditors is not of itself sufficient to induce the court to approve the scheme (*Ex parte Reed and Bowen* (1886), 17 Q. B. D. 244).

(*b*) See *ante*, pp. 533—535.

(*c*) *In re E. A. B.*, [1902] 1 K. B. 457. Every scheme must provide for the payment of certain debts in full, see *ante*, p. 561.

the terms of obtaining a security from a third person, even though he is thereby placed in a better position than the other creditors, provided the arrangement was not made with the knowledge and on behalf of the debtor (*d*). As a general rule, the releases must be absolute and the circumstances under which they were obtained must be fully disclosed (*e*); but there may be cases in which a conditional withdrawal will suffice (*f*). Nor will the court refuse to approve a scheme on the ground of the debtor's misconduct unless it is of such a character as to make it against public policy to sanction the scheme (*d*). If the consent of the court is given the receiving order is discharged, and the adjudication, if made, is annulled, and the bankrupt's property reverts to himself or goes to such person as is nominated in the scheme; the debtor thereafter being released from all liabilities from which a discharge would have released him, subject, however, to the terms of the scheme.

The trustee under a scheme is, so far as possible, in the same position as the trustee in bankruptcy; but he must adhere to the terms of the arrangement.

Powers are reserved to the court to annul an arrangement if it fails to be workable, or if the debtor does not carry out his part of it (*g*).

Sometimes creditors arrange with the debtor outside the provisions of the Bankruptcy Acts, but in such a case the rules of bankruptcy do not apply, and the debtor is released from the claims only of those who

(*d*) *In re E. A. B.*, [1902] 1 K. B. 457.
(*e*) *In re Pilling*, [1903] 2 K. B. 50.
(*f*) *In re Flew*, [1905] 1 K. B. 278.
(*g*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (15).

assent to the scheme. The arrangement is a contract and subject to the general law relating thereto. Any secret preference given or bargained for by any creditor entitles the others to recede from the arrangement. By the Deeds of Arrangement Act, 1887 (*h*), no such arrangement is binding unless the deed containing it is registered at the Bills of Sale Office within a time and according to the rules fixed by the Act.

Bankruptcy of Partnerships and Partners.

As a whole the rules governing the administration of the estate of an individual apply to that of a firm, but in some respects there are variations. In ordinary cases the receiving order may be made against a firm (*i*), but it operates as an order against each individual member, and the court will order discovery to be made of the names of the partners.

The statement of affairs must be presented as in ordinary cases, but each partner must file a statement as to his own individual estate. The adjudication is made as against the individuals by name and not against the firm (*k*).

The first meeting is attended by the joint creditors and by the creditors of each separate partner's estate, the joint creditors appointing the trustee (*l*), each estate being entitled to its own committee of inspection. The trustee's remuneration is fixed by each estate separately.

Administration of the joint and separate estates is dealt with *ante*, pp. 188 *et seq.*

(*h*) 50 & 51 Vict. c. 57.
(*i*) Section 115.
(*k*) Rule 264.
(*l*) Rule 268.

ADMINISTRATION OF THE ESTATE OF A DECEASED INSOLVENT.

If petitioning creditors whose debts amount to £50 in the aggregate demand it, the estate may be administered in the local court of bankruptcy; or if an administration on the equity side is in progress, the court may transfer it to bankruptcy (*m*).

The creditor who desires an administration order must petition in the prescribed form, must verify his petition by affidavit, and must show that there is no reasonable probability of the estate being able to pay its debts. Notice to the legal personal representative of the presentation of a petition is, in the event of an order being made, equivalent to notice of an act ot bankruptcy.

The official receiver becomes trustee, unless the creditors by ordinary resolution elect a trustee (and committee of inspection also, if so desired) (*n*), and he must pay funeral and testamentary expenses in priority to every other debt; he is entitled to have detailed information as to the assets and liabilities given him by the executor or administrator, and may ask of them every information he requires.

SMALL BANKRUPTCIES.

If the estate is under £300, and a receiving order is made, the court can order a "*summary administration*," in which case the estate is administered by the official

(*m*) Section 125.
(*n*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 21.

receiver as trustee, and without a committee of inspection, but by special resolution the creditors may select a trustee and have the estate administered in the ordinary way (*o*).

When a judgment has been obtained in a county court and the debtor is unable to pay, and his debts amount to not more than £50, the county court may, without putting the estate into bankruptcy, make an order for their payment by instalments or otherwise, and either in full or to such an extent as may seem just (*p*).

(*o*) The procedure is regulated by s. 121.
(*p*) Section 122.

PART V.

ARBITRATIONS.

ARBITRATIONS are now mainly governed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), and references to sections throughout the present chapter are to the sections of that Act. An agreement to refer matters in dispute to the judgment of a third person is called a submission, and under the Act a submission is defined as a "written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not" (*a*). The parties to a submission must show an intention to be concluded by the decision of the arbitrator, and accordingly there must be a "difference" between them; a mere valuation is not an arbitration.

There are four methods in which an arbitration may be brought about, viz.:

1. *Under Order of the Court by Consent.*—In any action, if all the parties consent, the court may order the whole matter to be tried before a special referee or arbitrator, or before an official referee or officer of the court (*b*).

2. *Under Compulsory Order of the Court.*—Subject to the right to have the case tried by jury, the court may refer any question arising in an action for inquiry or report to any official or special referee (*c*).

(*a*) Section 27. (*b*) Section 14 (a). (*c*) Section 13.

The court may refer the whole action or any question arising therein for trial (1) if prolonged examination of documents or scientific or local examination is required; (2) if the question in dispute is wholly or in part matter of account (*d*).

3. By certain statutes the parties are given an option to refer disputes, and in some cases the reference is made compulsory. The Arbitration Act, 1889, applies, except in so far as it is inconsistent with the provisions of the special Act (*dd*).

4. *By Consent out of Court.*—Submissions may be made—

(a) Orally.

(b) By writing not under seal.

(c) Under seal.

It is desirable that a submission should be in writing, but not necessary except for a submission under the Arbitration Act, 1889. A submission under seal is necessary if it refers to an act which must be performed by deed or if it is to bind a corporation.

A submission, unless a contrary intention is expressed, is deemed to include the following provisions (*e*):

(a) The reference shall be to a single arbitrator, if not otherwise provided.

(b) If the reference is to two arbitrators, they may appoint an umpire at any time within the period during which they have power to make an award.

(c) Arbitrators must make the award in writing within three months, unless by writing they enlarge the time for making the award.

(d) If the arbitrators allow their time to expire

(*d*) Section 14 (b), (c).

(*dd*) Section 24.

(*e*) Schedule I.

without making the award, or give notice in writing that they cannot agree, the umpire may enter on the reference in lieu of the arbitrators.

(e) The umpire must make his award within one month after the time of the arbitrators has expired, unless, by writing, he enlarges the time for making his award.

(f) and (g) The arbitrators or umpire may examine parties and witnesses on oath and require the production of books and documents.

(h) The award shall be final and binding on the parties.

(i) The costs of the reference and award shall be in the discretion of the arbitrators or umpire.

THE SUBMISSION (*f*).

Effect of a Submission upon Action.—A submission to an arbitration will not necessarily bar legal proceedings; but if a party commences an action the court may, on the application of the other party, stay the action if the applicant has not taken any step in the action (except putting in an appearance), and there is no sufficient reason why the dispute should not be referred, and the applicant is ready and willing to do all things necessary to the proper conduct of the arbitration (*g*).

Alteration and Enlargement.—A submission may be altered by agreement between the parties, but the arbitrator has no power to alter its terms. The court can amend so as to give effect to the real intention of the parties, but not so as to introduce new matter.

(*f*) Every submission requires a 6*d*. stamp, unless the subject-matter is not of the value of £5, when no stamp is necessary (Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 22).

(*g*) Section 4.

The time for making an award can be enlarged by order of the court, whether it has expired or not, and that although the award was made after the expiration of the time limited (*h*).

Revocation of Submission.—A submission (unless a contrary intention is expressed) is irrevocable except by leave of the court (*i*). The court will give leave to revoke a submission for good cause—*e.g.*, misconduct of the arbitrator, or improper admission or rejection of evidence. The death of one of the parties no longer operates as a revocation of the submission (*k*), but it is usual still to insert a clause in the submission providing that in the event of the death of one of the parties the award shall be delivered to his personal representatives. The bankruptcy of one of the parties does not necessarily revoke the submission, but it may be ground for an order by the court revoking it.

THE ARBITRATOR AND UMPIRE.

The Arbitrator.—Any person may be appointed arbitrator, and an interest in the subject-matter known to both parties at the time of appointment is no objection (*l*). Secret interest or bias renders an arbitrator unfit, and he can be removed by order of the court (*m*). Similarly where an arbitrator or umpire has misconducted himself the court will remove him and set aside the award (*n*).

Joint Arbitrators.—If the reference is to several arbitrators, they must act together, and must sign the

(*h*) Section 9.
(*i*) Section 1.
(*k*) R. S. C., Order XVII., r. 1.
(*l*) *Johnston* v. *Cheape* (1817), 5 Dow. 247.
(*m*) *Beddow* v. *Beddow* (1878), 9 Ch. D. 89.
(*n*) Section 11.

award simultaneously (*o*), for an arbitrator cannot delegate his authority even to his co-arbitrators. If one refuse to act, the others can make no valid award (*p*).

The Umpire—his Appointment.—If the reference is to two arbitrators, they may appoint an umpire at any time within the period during which they have power to make the award (*q*). If they fail to do so any party may serve the arbitrators with a written notice to appoint, and if the appointment is not made within seven clear days, the court may appoint (*r*). The duties of the umpire commence when he is called upon to act, not when he is appointed.

Sometimes a third arbitrator is appointed instead of an umpire ; in that case his duties commence at once, and all three arbitrators must agree to the award and sign it (*s*). If the objection to the execution of the award is only formal, the court may remit the award to the arbitrators for correction.

Duties.—The umpire enters on the reference in lieu of the arbitrators. He must decide the whole matter between the parties, and not particular points upon which the arbitrators cannot agree. The umpire must make his award within one month after the time allowed to the arbitrators, but the court has power to enlarge this time. The umpire has the same powers and is bound by the same rules as the arbitrators.

Proceedings before the Arbitrator.—The arbitrator has, with regard to the parties to the submission, the

(*o*) *Eads* v. *Williams* (1855), 24 L. J. Ch. 531.
(*p*) *Little* v. *Newton* (1841), 10 L. J. C. P. 88.
(*q*) Schedule 1 (b). (*r*) Section 5.
(*s*) *United Kingdom Mutual Association* v. *Houston*, [1896] 1 Q. B. 567.

powers of a judge, and the proceedings resemble those of an action (*t*). The attendance of witnesses and the production of documents can be enforced by subpœna (*u*), and disobedience is a contempt of court. Any person giving false evidence is guilty of perjury (*x*). The arbitrator may, at his discretion, exclude persons who are going to be examined before him during the time that any of the other witnesses are giving evidence. A lay arbitrator is generally allowed to have a legal adviser to sit with him or assist him during the hearing. If any question of law arises in the course of the reference, the arbitrator may at any stage of the proceedings "state a case" for the opinion of the court or a judge; and if the court or a judge so directs, the arbitrator is obliged to do so (*y*). If the arbitrator refuses to state a case and makes his award summarily so as to preclude an application to the court, that is misconduct, and the award may be sent back with an order to state a case (*z*).

An arbitrator may, generally speaking, take skilled advice, but it is not advisable that he should do so without the consent of the parties. Where an arbitrator is authorised to appoint an accountant, "if not objected to by the parties," he may not appoint one without communicating with the parties (*a*). As regards evidence, the arbitrator or umpire is bound to observe the rules of evidence no less than judges (*b*). The

(*t*) *In re Enoch and Zaretzky, Bock & Co.'s Arbitration*, [1910] 1 K. B. 327.

(*u*) Section 8.

(*x*) Section 22. (*y*) Section 19.

(*z*) *Re Palmer & Co. and Hosken & Co.'s Arbitration*, [1898] 1 Q. B. 131.

(*a*) *In re Tidswell* (1864), 33 Beav. 213.

(*b*) *In re Enoch and Zaretzky, Bock & Co.'s Arbitration, supra.*

arbitrator must hear both sides, and take evidence in the presence of both parties. He should receive all the evidence tendered, taking notes of everything material, but if he rejects evidence under a mistake as to its value it is not sufficient ground for setting aside the award ; similarly, if he receive evidence upon matters not coming within the scope of the reference, his award will not on that ground alone be set aside (*c*). He has no right to call a witness without the consent of the parties (*b*).

An award will not stand if—

(1) The arbitrator hears one party and refuses to hear the other.

(2) He holds private communication with one party on the subject-matter of the reference.

(3) He examines witnesses on one side in the absence of the other party, unless justifiably proceeding *ex parte*.

(4) He examines witnesses in the absence of both parties.

The Award.

Form and Requisites of the Award.—The arbitrator should decide all matters submitted to him under the submission, but he should not go beyond them ; if he transgress in either respect the award is void. As soon as the arbitrator has executed the award, he should give notice to the parties that it is ready to be delivered. No precise form of award is necessary, but the award must be in *writing*, unless the submission

(*c*) *Fulkingham* v. *Victorian Railway Commissioners*, [1900] A. C. 452.

provides to the contrary (*d*). By a recent statute all awards are chargeable with ten shillings stamp duty (*e*).

The chief requisites of an award are three in number, viz. :

Firstly, the award must be *certain* in meaning, so that the parties to the reference can understand how they are affected by it ; but the court will assist the parties to interpret it, if possible, and make any alterations necessary to make the meaning clear. If its meaning cannot be interpreted, the award is bad.

Secondly, the award must be *final* : that is to say, the arbitrator can only make one award, except where several matters are referred, and the submission authorises a separate award on each. The award must be complete in itself and must be made at one time.

Thirdly, the award must be *possible and reasonable*, *e.g.*, an award that a party should deliver up a deed not in his custody or under his control would be void.

If the award is bad in part it is not necessarily void ; if the good can be separated from the bad, the latter alone is void, as where an arbitrator has awarded on some matters not within the submission ; but if the two parts are not separable the whole award is void.

Referring Back the Award.—The court may remit matters referred to the reconsideration of the arbitrators or umpire (*f*) : they must make their award within three months after the date of the order for remission (*g*). The grounds for this are :

(a) Any defect sufficient to empower the court to set it aside.

(*d*) Schedule 1 (c).
(*e*) Revenue Act, 1906 (6 Edw. 7, c. 20), s. 9.
(*f*) Section 10. (*g*) Schedule 1 (c).

(b) That it is not final.
(c) That the submission has been exceeded.
(d) For omission through inadvertence.
(e) For formal defects.
(f) For mistake admitted by the arbitrator.
(g) Where new and material evidence has been discovered.

This power applies not only to references by consent out of court, but also to references by order of the court (*h*).

Setting Aside the Award. — The award will be set aside on the following grounds :

(a) Where the arbitrator or umpire has misconducted himself (*i*).
(b) If the award is uncertain or not final.
(c) Where the arbitrator is guilty of fraud or refuses to hear the evidence.
(d) For irregularity in the proceedings, *e.g.*, not giving notice of the proceedings.
(e) In a compulsory reference if the arbitrator makes a mistake of fact or law. In a reference by consent the court will not set aside the award for mistake, unless the mistake is apparent on the face of the award.

The court will not grant an application to set aside the award unless convinced of its necessity, but will rather remit the award under s. 10.

Enforcing an Award.—An award may, by leave of the court, be enforced in the same manner as a judgment (*k*) :

(a) By action on the award. (This is the only

(*h*) Section 16.
(*i*) Section 11 (2).
(*k*) Section 12.

remedy where the submission is not in writing.)

(b) By attachment.

(c) By execution.

The court will also grant specific performance of an award.

Costs of Award and Remuneration of Arbitrator.—The costs are in the discretion of the arbitrator or umpire, who may direct how they are to be paid (*l*), but when the submission provides that the costs shall abide the event, the arbitrator has no power over them, otherwise he should direct which party is to pay in the award. The arbitrator may fix his own charges, and provided he does so in and as part of his award, they cannot be taxed; he has a lien on the award and submission, and may retain them until his charges are paid. He can also recover reasonable remuneration by action, if necessary; for the appointment of a person as arbitrator in a mercantile dispute raises an implied promise by the parties to the submission to pay for his services. Thus, the unsuccessful party to an arbitration must pay the remuneration of an arbitrator appointed by the other side, if so ordered by the umpire under his award, and the arbitrator can sue for the amount in question (*m*). The same principle applies with regard to the remuneration of an umpire appointed by the arbitrators.

(*l*) Schedule 1 (i).

(*m*) *Crampton and Holt* v. *Ridley & Co.*; *Brown* v. *Llandovery Terra Cotta Co., Limited* (1909), 25 T. L. R. 625.

APPENDIX.

PATENTS, TRADE MARKS, AND COPYRIGHT.

[These Subjects do not come within the curriculum for the Final Examination of Chartered Accountants, but they have been inserted in the Appendix of this Work in view of the representations made by those connected with certain other Examinations.]

PATENTS, TRADE MARKS, AND COPYRIGHT.

PATENT ACT, 1907.

There is a common law right inherent in the Crown to grant to a subject the monopoly of a trade or manufacture. This right was restricted by the Statute of Monopolies, 1623, but the prerogative of the Crown to grant letters patent for the sole working of new trades or manufactures to the true inventor for a period of fourteen years or under was preserved. This right forms the basis of the existing patent law which was amended and consolidated by the Patents and Designs Act, 1907 (7 Edw. 7, c. 29).

Letters patent may be obtained (1) by inventors in the United Kingdom; (2) by persons in the United Kingdom to whom an invention has been communicated from abroad; (3) by legal representatives of deceased inventors; (4) by persons belonging to those foreign states or colonies which have joined the International Convention for the Protection of Industrial Property (*a*).

Patent agents must be registered and are liable to be struck off the register by the Board of Trade for professional misconduct. No person can act as a patent agent unless he resides in the United Kingdom.

The applicant for letters patent must, in the first instance, produce either a provisional specification of his invention or a complete specification. The patent is ultimately dated as of the date of the first application. The specification is referred to an *examiner* for its first examination; he reports to the *comptroller*. In the case of a provisional specification the examiner has to inquire

(*a*) The Convention was signed at Paris, March 20th, 1883, and was modified by an Additional Act signed at Brussels, December 14th, 1900. Great Britain joined in 1884.

into the nature of the invention generally before allowing the application; if his report is satisfactory a complete specification must be left within six months, which must be properly described, and conform to the provisional specification. When the first application is accompanied by a complete specification the examiner has to see that the invention has been described in the proper way and is in accordance with the rules of the Board of Trade. The first examination, whether in two parts or one, is followed by a further investigation in order to discover if the invention has been claimed or described in any previous specification, and includes (since the 1907 Act) an inquiry into specifications which may have been lodged at the Patent Office before the specification in question though not published. There is a right of appeal from the examiner to the comptroller, and from the comptroller to one of the law officers of the Crown. The patent is then accepted.

After acceptance the grant of letters patent may be opposed by persons interested on the following grounds: (1) that the applicant has obtained his invention from or in fraud of the opponent; (2) that the invention has been claimed in a complete specification made within the last fifty years; (3) that the complete specification in question is insufficient; (4) that the applicant in his complete specification claims something different to what is described in the provisional specification, and that the opponent has applied for a patent for this further invention in the interval. The opponent will not be heard to say that the invention was obtained from him abroad. The hearing takes place before the comptroller with the right of appeal to one of the law officers. The comptroller may order the applicant to make general or specific references to prior claims for patents (for the ground of opposition is the repetition of a claim, not the infringement of an earlier by a later patent), or (since the 1907 Act) refuse to grant a patent altogether.

Persons residing out of the United Kingdom can (since the 1907 Act) obtain British patents either in their own names or by means of an agent, who is the importer of the invention and a trustee for the real inventor. Persons living in the colonies or states which have joined the International Convention may apply to have their patents dated as of the same date as the earliest protection in the colony or state concerned if filed within twelve months and accompanied by a complete specification. The subsequent proceedings are the same as in a British application.

Patents may be sealed within a few days after their final acceptance, and must be sealed within fifteen months from the date of application (subject to certain allowances). If a patent lapses in this way through inadvertence it may now be restored, though prior to the 1907 Act this required an Act of Parliament. The patent is granted for fourteen years, but the term may be extended.

After a patent has been applied for or granted the patentee may apply for a patent for an improvement in his invention as a patent of addition which lasts for as long as the original patent, and for which no further fees are charged. A patentee is also allowed, under certain circumstances and within certain limits (precisely set out in the Act, ss. 21—23), to make amendments of his patent.

Revocation of a patent may be ordered either by the comptroller or the Board of Trade, or the Court of Chancery. Application to the comptroller must be made within two months by a person who would have been entitled to oppose and on the grounds upon which the grant of the patent could have been opposed.

Any person may apply to the comptroller for the revocation of a patent which is being exclusively worked outside the United Kingdom after four years from the date of the patent; and if a patentee is not working his

patent adequately or is prejudicing any trade or industry, any person may apply to the Board of Trade for a revocation of the patent or for a compulsory licence. After a primâ facie case has been made out the Board of Trade refers the matter to the court. The court, generally, has power to make an order for revocation on any of the grounds on which the comptroller or the Board of Trade could, and also on a number of other grounds, such as that the alleged invention is not new, or that it is not a manufacture; petition for revocation may be made by the Attorney-General or by any person alleging that the patent was obtained in fraud of his rights, or that he was the true inventor, or that he had exercised the invention before the date of the grant.

Patentees are now forbidden to impose restrictive conditions (such as were common before the 1907 Act) on the purchasers of patented articles or on licensees, and they are now allowed to abandon their patents.

In actions of infringement (by the 1907 Act) the grounds of defence have been extended, and the defendant may counterclaim for revocation; a person threatened with an action of infringement may institute proceedings himself if the patentee does not bring his action within a reasonable time.

A register is kept at the Patent Office of proprietors of patents, their mortgagees, and licensees, of equitable assignments and options, and of notices as to amendments and payment of fees. The court has power to rectify the register. It is not clear how far registration is necessary to protect the title of an assignee. Co-owners of patents may not separately grant licences. On the death of a co-owner the legal estate in the patent counts as personalty.

The Crown, the War Office, and (since the 1907 Act) the Admiralty have the right to use patents on paying a sum fixed by the Treasury.

It is a criminal offence, punishable on summary conviction by a fine of £5, falsely to represent that an article is patented.

Design means "any design (not being a design for a sculpture under the Sculpture Copyright Act, 1814), applicable to any article whether the design is applicable for the pattern or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining or any other means whatever, manual, mechanical, or chemical, separate or combined." Copyright by registration of designs lasts five years; the design must be entered in one of fourteen definite classes according to its material. Exact drawings or photographs must be sent to the comptroller before a certificate is issued. An appeal lies from the comptroller to the Board of Trade. The proprietor of the design, whether or not he is the author, may apply for registration. Designs need not be marked, but if they are not marked the proprietor in an action of infringement must prove that the infringer knew of the copyright. It is a criminal offence falsely to represent that a design is registered.

The provisions relating to the International Convention apply to designs as well as to patents, and a registered design may be revoked if it is used abroad and not in the United Kingdom.

Trade Marks Act, 1905.

At common law there is a right of action against any person for "passing off" goods as those of another person; the usual method of "passing off" is to adopt or to imitate the "mark" which that other person generally applies to his goods for the purpose of identifying

them. The Trade Marks Act, 1905 (5 Edw. 7, c. 15), consolidating and amending previous legislation on the same subject (especially the Trade Marks Registration Act, 1875, and the Patents, Designs and Trade Marks Act, 1883), has for its object to fix the proprietorship of a trade mark; the registration of a person under the Act as proprietor of a trade mark gives him the exclusive right to the use of the trade mark, consequently if another person adopts this mark or an imitation of it, the registered proprietor has a right of action for infringement, and in an action of "passing off" (the two actions are usually combined) the adoption of a registered trade mark is conclusive evidence against the defendant. The Act of 1883, by connecting trade marks with patents, had given colour to the notion that trade marks were monopolies, the number of which should be limited; the Act of 1905 is based on the idea that goods of different qualities but of apparent similarity should be clearly distinguished from one another in the interest both of the manufacturer and of the purchasing public.

The Act first provides that there shall be a register of trade marks under the management of the Comptroller General of Patents, Designs and Trade Marks, who is called the Registrar. A trade mark can only be registered in respect of particular goods or classes of goods, and must contain or consist of at least one of the following essential particulars:

(1) The name of a company, individual or firm represented in a special or particular manner;

(2) The signature of the applicant for registration or some predecessor in his business;

(3) An invented word or invented words;

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

(5) Any other distinctive mark, but a name, signature, or word other than such as fall within (1), (2), (3) or (4) shall not, except by Order of the Board of Trade or the court, be deemed a distinctive mark.

An exemption is made for trade marks existing before August 13th, 1875, and provision is made for allowing colours to be considered distinctive marks.

Any person claiming to be the proprietor of a trade mark who is desirous of registering the same must apply in writing to the registrar. There is a right of appeal from the decision of the registrar either to the Board of Trade or to the court at the option of the applicant. After the application has been accepted it is advertised by the registrar. Any person may within one month from the date of the advertisement give notice to the registrar of opposition to the registration of the mark, either on the ground of its resemblance to an existing trade mark, or as not being sufficiently distinctive. The matter is decided by the registrar subject to appeal to the court or, with the consent of the parties, to the Board of Trade. The court is the Chancery Division of the High Court of Justice.

Under the 1905 Act it is now possible for the proprietor of a trade mark to "disclaim" part of his mark and to limit his rights only to the other part. This saves him from liability to opposition on the ground that his trade mark lacks the essential features; for part obviously might not be distinctive though connected with or, perhaps, printed over a distinctive mark, and he would have no wish to assert proprietary rights in non-distinctive parts at the risk of losing rights over the distinctive parts. The same proprietor may have what are called associated trade marks, viz., similar but not identical marks for certain classes of goods; he may also split up a mark using its component parts as separate

trade marks, or have a series of marks for a number of similar goods.

Associations which examine or test particular kinds of goods and certify the result of their examination by marking the goods may, with the leave of the Board of Trade, register their marks as trade marks. Lloyd's Register (L. R.) on shipbuilding materials is an example of this. The privileges of the Cutlers' Company in relation to Sheffield goods are incorporated into the Act; their register forms part of the general register; a similar arrangement is made for Manchester cotton goods, the marks of which are registered at "The Manchester Branch."

When the time for opposition has expired the trade mark is registered by the registrar as of the date of the application for registration, and a certificate is issued to the applicant. A trade mark is registered for fourteen years, and may then be renewed for another fourteen years on payment of the prescribed fees. If the proprietor does not use his trade mark for five years, anyone who is aggrieved may apply to the registrar to have it removed from the register.

A trade mark can only be assigned in connection with the goodwill of the business concerned in the goods. On the dissolution of a partnership the apportionment of trade marks may be settled by the registrar, subject to appeal to the Board of Trade.

The register may be rectified either by the registrar or by the court. The registrar's authority is limited to applications by the proprietor for corrections of a clerical nature, for cancellations of all or part of the mark, and for the registration of assignees. The court deals with applications by aggrieved persons.

Disputes arising upon trade marks registered before 1905 are determined either by reference to the Acts in force at the date of their registration, or to the present Act. This Act provides for the first time that any regis-

tration which has been standing for seven years is to be taken to be valid in all respects unless it was obtained by fraud, or offends against s. 11, which forbids the registration of marks "calculated to deceive or contrary to law or morality." This protection is one of the most important features of the 1905 Act.

A fine of £5 may be imposed on a person for falsely representing a trade mark as registered, and anyone authorised to use the Royal Arms in connection with his trade may take proceedings against a person in a similar trade using them without authority.

MERCHANDISE MARKS ACTS.

Criminal law in relation to trade marks is contained in the Merchandise Marks Acts of 1887 (50 & 51 Vict. c. 28) and 1891 (54 & 55 Vict. c. 15).

By the common law, though it was an offence to cheat by selling goods as something different to what they were, it was no offence merely to imitate a trade mark. The first Merchandise Marks Act was passed in 1862; in 1884 Great Britain joined the International Convention for the Protection of Industrial Property, and this necessitated the Act of 1887, to the provisions of which were added the provisions of the Act of 1891.

By the Act of 1887 any person who forges a trade mark or falsely applies to goods any mark so nearly resembling a trade mark as to be calculated to deceive or makes any die or instrument for the purpose of forging a trade mark or disposes of or possesses such an instrument or applies any false trade description to goods or causes any of these things to be done is liable to be punished by fine or imprisonment with hard labour or both, and to have the goods forfeited and destroyed. The same penalties are attached to those who wilfully sell articles under a false mark. Persons whose ordinary business is to make dies are protected from prosecution.

The expression "trade mark" is defined as a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale (*a*).

The expression "trade description" means any description or statement as to quantity, place of origin, manner of manufacture, material of which the goods are made, or existing patent or copyright protecting the goods. Special provision is made for distinguishing the place of origin of watches and watch cases, and having the watch case properly stamped at an assay office. By the Merchandise Marks Act, 1891, the customs entry relating to imported goods is now deemed to be a trade description. Formerly adulterated goods were imported under cover of the customs entry, but as that entry did not constitute a "trade description," no steps could be taken; by making it a trade description offenders can be prosecuted. The same Act gives power to the Board of Trade to undertake prosecutions when the general interests of the country are affected.

Prosecutions under the Act must be commenced within three years of the commission of the offence or one year after discovery, whichever is soonest. All goods liable to forfeiture under this Act if imported from abroad and all goods of foreign manufacture bearing a trade mark which purports to be a trade mark of a trader in the United Kingdom (unless there is a clear indication that it has been manufactured abroad) are prohibited to be

(*a*) The expression "trade mark" is defined in the Acts of 1887 and 1891 by reference to the Patents, Designs and Trade Marks Act, 1883, which has been repealed. The statute dealing with trade marks is the Trade Marks Act, 1905, to which (by virtue of s. 38 of the Interpretation Act, 1889) references to the Act of 1883 must now be construed to refer.

imported as if they were included in s. 42 of the Customs Consolidation Act, 1876. There is, however, no need for all imported goods to be stamped with their place of origin.

On the sale of any goods to which a trade mark or a trade description has been applied, the vendor is deemed to warrant that the mark is a genuine trade mark, and not forged or falsely applied, and that the description is genuine unless he expresses the contrary in writing (*b*). Provision is made in the Act, however, by which conventional descriptions (which are not calculated to deceive), such as French chalk, Brussels carpets, Morocco leather, are not to be deemed false descriptions.

A person who falsely represents that any goods are made by a person holding a Royal Warrant, or for the service of the King or the Royal Family, or for a government department, is liable to a penalty of £20.

COPYRIGHT.

Copyright is the exclusive right of multiplying copies of a literary, artistic, or musical work already published (*c*), and "if not the creature of our statute law is now entirely regulated by it" (*d*).

(*b*) This is "saved" in s. 14 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which says: "Subject to the provisions of this Act and *of any statute in that behalf* there is no implied warranty" of the quality of goods in a contract of sale.

(*c*) Before publication the rights of the author or owner depend upon common law incidents of property, and vary according to the nature of the composition and the relations of the parties whose rights are in question. These rights are not, strictly speaking, "copyright."

(*d*) *Jefferys* v. *Boosey* (1854), 4 H. L. Cas. 815, at p. 954; *Caird* v. *Sime* (1887), 12 App. Cas. 326. The history of the English law of copyright is set out in Scrutton on Copyright. Prior to the Statute of Anne, 1709 (8 Anne, c. 19), there was no statute expressly creating, or judicial decision expressly recognising, copyright. That statute vested

By the Copyright Act of 1842 (5 & 6 Vict. c. 45), the copyright in *books* endures for forty-two years from publication, or for seven years from the death of the author, whichever is longest, and is the property of the author and his assigns; book is defined as "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart or plan separately published." After the death of the author the Privy Council may licence the republication of books which the proprietor refuses to republish. A copy of every book must be sent to the British Museum, and must be sent on demand to the Universities of Oxford and Cambridge, to Trinity College, Dublin, and to the library of the Faculty of Advocates at Edinburgh. In order to maintain an action for infringement of copyright the author must register his book at Stationers' Hall; this may be done after infringement (*e*). Assignments of copyright may be entered in the register at Stationers' Hall. A penalty of £10 and double the value of the book is imposed upon anyone other than the proprietor importing into the United Kingdom for sale or hire a book composed in the United Kingdom and reprinted elsewhere (*f*).

The copyright of *newspaper articles*, articles in magazines and the like, is vested in the proprietor of the magazine or newspaper on payment to the author for the article and not otherwise. Upon the expiration of twenty-eight years the copyright reverts to the author,

copies of printed books in the author and purchasers for fourteen years. The period was extended in 1814 by 54 Geo. 3, c. 156, to a term of twenty-eight years or for life, whichever was longest; that Act remained in force till 1842. The present law of copyright is in a state of the greatest confusion.

(*e*) *Gambaud* v. *Wallace* (1877), 36 L. T. 704.

(*f*) By the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42, any imported copyright book is liable to be forfeited and destroyed.

and during that period the newspaper proprietor must not publish the article separately without the consent of the author.

Pirated books become the property of the owner of the copyright. By the Copyright Act, 1775 (15 Geo. 3, c. 53), "the two universities in England, and the colleges therein, the four universities in Scotland and the colleges of Eton, Westminster and Winchester, are entitled to perpetual copyright in books given or bequeathed to them for the advancement of useful learning and other purposes of education."

The copyright of a *lecture* is given to the lecturer by the Lectures Copyright Act, 1835 (5 & 6 Will. 4, c. 65), for twenty-eight years, provided he gives notice in writing of his intended delivery of the lecture to two justices of the peace living within five miles from the place of delivery, at least two days beforehand. The penalty for infringing this copyright is forfeiture of the reprints and a fine at the rate of one penny per sheet. The Act does not apply to a lecture given at a university, or a college, or a public foundation; the law in regard to lectures of that character being left as it was in 1835. That law is, briefly, that before the publication of a lecture the author can prevent others from publishing it; after publication anybody may reproduce it. The question, therefore, in the case both of lectures excluded from the provisions of the Act and those delivered without complying with them, is whether there has or has not been publication. A speech of Lord Rosebery, delivered at a public meeting, was held to be published so that the reporter obtained the copyright for his verbatim written report (*g*); a lecture of Professor Caird, delivered to a class in Glasgow, was held not to have been published (*h*).

(*g*) *Walter* v. *Lane*, [1900] A. C. 539.
(*h*) *Caird* v. *Sime* (1887), 12 App. Cas. 326.

The author of a *dramatic* piece is by the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), given the sole liberty of representing it at any place of dramatic entertainment for forty-two years or the life of the author and seven years, whichever is longer; a penalty of 40s. or the full amount of the profit of the representation is payable to the proprietor by anyone offending against the Act.

By s. 20 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), the first representation of a dramatic piece is deemed equivalent to the first publication of a book (*i*) for the purpose of calculating the statutory period of copyright.

The law of copyright in *music* is similar to the law in respect to the drama. The right of the performance of a musical composition is vested in the author by s. 20 of the Copyright Act, 1842, which applies the provisions of the Dramatic Copyright Act, 1833, to musical compositions. The law as to the printing of a musical composition is covered by the Act of 1842, which includes a "sheet of music" in the definition of a book.

The Copyright (Musical Compositions) Act, 1882 (45 & 46 Vict. c. 40), compels the proprietor of musical copyright to print the fact that the right of public representation and performance is reserved, on the title page of the composition; and where the right of printing and the right of performance are in different hands, to set that out too.

The Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17), allows the damages for unauthorised

(*i*) The exact effect of s. 20 is open to doubt. Scrutton summarises the law thus:

(1) A dramatic piece neither printed nor represented is the perpetual property of the author at common law.

(2) If represented but not printed, the author has "playright" for the statutory period and copyright, which may be perpetual, of his unpublished MS.

(3) If printed but not represented, the author has perpetual playright and copyright for the statutory period.

This would apply also to musical compositions. See next paragraph.

performances to be fixed at the discretion of the court or judge. Under the Act of 1833, the damages were fixed at a minimum of 40*s*. or the value either of the loss to the plaintiff or of the benefit of the infringer, whichever was greater.

By the Musical (Summary Proceeding) Copyright Act, 1902 (2 Edw. 7, c. 15), a court of summary jurisdiction may authorise the seizure of pirated copies of musical compositions which are being hawked in the streets, and by the Musical Copyright Act, 1906 (6 Edw. 7, c. 36), a person found in possession of pirated music is liable to a fine of £5 for the first offence, and to imprisonment for two months with hard labour or a fine of £10 for the second offence.

By the Sculpture Copyright Act, 1814 (54 Geo. 3, c. 56), the sole right and property of any new and original *sculpture*, model, copy, or cast, rests in the proprietor for fourteen years, with an additional term of fourteen years if the maker of the original sculpture is living at the end of the first fourteen years. Copyright in sculpture can only be transferred by deed signed by the proprietor in the presence of two witnesses.

The law of copyright in *engravings and prints* can only be determined by reference to six statutes. By the Engraving Copyright Act, 1734 (8 Geo. 2, c. 13), the inventors and engravers of historical and other prints are given the copyright for fourteen years (extended to twenty-eight years in 1766), provided the date of publication is engraved; a person who infringes the copyright, besides forfeiting the plates and sheets, is liable to a penalty of 5*s*. for every print found in his possession, half of which goes to the Crown, half to anyone who sues for it.

By the Engraving Copyright Act, 1766 (7 Geo. 3, c. 38), the subject matter is more carefully defined, and the period extended to twenty-eight years. By the Prints Copyright Act, 1777 (17 Geo. 3, c. 57), the owner of the

copyright may sue an infringer for damages. By the Prints and Engravings Copyright Act, 1836 (6 & 7 Will. 4, c. 59), the protection of copyright in prints and engravings is extended to Ireland. By the International Copyright Act, 1852 (15 & 16 Vict. c. 12), s. 14, the provisions of the four Acts above mentioned are extended to *lithographs;* finally, the provisions of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68) (see next paragraph), are applied to *engravings* of any original painting, drawing or photograph.

By the Fine Arts Copyright Act, 1862, the copyright in *paintings*, *drawings* and *photographs* vests in the author for his life and for seven years after his death; they must be registered as in the case of books under the Copyright Act, 1842 (5 & 6 Vict. c. 45); a person who infringes the copyright is liable to forfeit £10 to the proprietor for every copy, or the proprietor may sue for damages in the ordinary way.

A penalty of £10, or double the price of the work of art, is also imposed on anyone fraudulently producing or selling a work of art purporting to be signed or executed by someone who has not in fact signed or executed it, provided that person has been living within the preceding twenty years.

The importation of pirated works of art of this kind is prohibited. This Act extends to any British subject or resident within the dominions of the Crown, but remedies can only be obtained in the United Kingdom.

When a work of art first changes hands without any agreement in writing as to the copyright, all copyright is lost unless it has been executed on commission; when it has been executed on commission, the copyright belongs to the person giving the commission, unless there is an express reservation in writing of copyright by the artist.

By the International Copyright Act, 1844 (7 & 8 Vict. c. 12), the Crown is empowered to grant copyright in the

United Kingdom to works—literary, musical or artistic—produced abroad, by Orders in Council relating to particular countries, and imposing certain regulations as to registration on the part of the authors. The International Copyright Act, 1852 (15 & 16 Vict. c. 12), allows the adaptation of French dramatic or musical pieces and the reproduction (with acknowledgments) of French newspaper articles. The International Copyright Act, 1875 (38 & 39 Vict. c. 12), gives power to the Crown to suspend the clause in the Act of 1852 relating to dramatic pieces. These Acts are now of small importance, because by the International Copyright Act of 1886 (49 & 50 Vict. c. 33) the Crown was empowered to issue Orders in Council embodying the terms of the Berne Convention then in session. The Berne Convention was signed in 1887 and was established in the United Kingdom by Order in Council of November 28th, 1887; an additional Order in Council was issued on March 8th, 1898. The effect of the convention is that the author of any literary, musical or artistic work first produced after December 6th, 1887, in any of the countries included in the convention enjoys the same copyright in the British dominions as if the work had been first produced in the United Kingdom. If the author is not a subject of the country of origin, the publisher has the copyright; but the copyright only endures in the United Kingdom for so long as it endures in the foreign country, and in any case not longer than the English law allows.

Copyright within the empire can be secured by publication in the United Kingdom, for by s. 29 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), copyright secured in the United Kingdom extends to every part of the British dominions, but publication in the colonies does not, under the Act, secure copyright in the United Kingdom. The Colonial Copyright Act, 1847 (10 & 11 Vict. c. 95), enables the Crown to suspend the Copyright Act in the

case of particular colonies; cheap foreign reprints may then be imported into the privileged colonies provided the local legislatures give some protection to the authors concerned (*k*).

By the Canada Copyright Act, 1875 (38 & 39 Vict. c. 53), power was given to the Crown to assent to a Canadian Copyright Act (giving copyright for twenty-eight years and a second term of fourteen years to books published or republished in Canada), and a proviso was added forbidding the importation into the United Kingdom of Canadian reprints.

By the International Copyright Act of 1886 (49 & 50 Vict. c. 33), s. 8, the Copyright Acts have been extended to works first produced in a British possession, with arrangements for their registration in local registers where such exist (*l*).

(*k*) Section 17 of the Act of 1842 would be suspended as well as the corresponding section in the Act relating to customs (now s. 42 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36)), forbidding the importation of copyright books reprinted abroad.

(*l*) It is doubtful whether this Act gives anything to works of art which they did not possess before.

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